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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:

) Docket No. 72-22-ISFSI

PRIVATE FUEL STORAGE, LLC
(Independent Spent Fuel
Storage Installation)

) ASLBP No. 97-732-02-ISFSI

) April 13, 2001

STATE OF UTAH'S REQUEST FOR ADMISSION OF
LATE-FILED CONTENTION UTAH SECURITY J
(Law Enforcement)

Legislation passed during the 2001 Utah Legislative Session prohibits a county from providing municipal-type services, including law enforcement, to any high level nuclear waste storage facility or transfer facility within the State of Utah and invalidates any pre-existing contract to provide such services. Pursuant to 10 CFR § 2.714, the State hereby seeks the admission of late-filed Contention Utah Security J which asserts that the Applicant, Private Fuel Storage, LLC ("PFS") may not rely on Tooele County to provide law enforcement assistance to the PFS storage facility or transfer facility. Thus, PFS does not comply with 10 CFR Parts 72 and 73.

The State meets the late-filed factors and, for the reasons stated below, the State requests the Board admit Contention Utah Security J.¹

¹ The request for admission of this security contention relies upon information in the public record. In particular, the State cites to or relies upon previous Board decisions which have been made publicly available, NRC regulations, and State of Utah legislation. The State does not believe there is any safeguards-protected information in this document and accordingly files it as a public record.

Template = SECY-041

SECY-02

BACKGROUND

In January 1998 the State timely filed nine contentions based on PFS's Physical Security Plan.² One of those contentions, Utah Security C, Local Law Enforcement, contended: "The Applicant has not met the requirements of 10 C.F.R. Part 73, App. C, Contents of the Contingency Plan, Law Enforcement Assistance." LBP-98-13, 47 NRC 360, 369 (1998).

At an in camera prehearing conference, held in Rockville, Maryland, on June 17, 1998, counsel for the Applicant presented the Board and the parties with a cooperative law enforcement agreement entered into by the U.S. Bureau of Indian Affairs ("BIA"), the Skull Valley Band of Goshutes ("Band") and Tooele County, Contract No. 97-06-02, on June 3, 1997 ("CLEA"). Of the nine Utah security contentions, the Board initially admitted only Utah Security-C, in part. *Id.* at 369-70, 374. The Board relied on the CLEA to find inadmissible portions of Utah Security A, B and C with respect to the Tooele County Sheriff's alleged lack of jurisdiction on the Band's reservation, *id.* at 368-70, but later reversed that decision based on the State's request for reconsideration which asserted that the County had improperly adopted the CLEA. *See* LBP98-17, 48 NRC 69 (1998).

In September 1998, Tooele County passed a resolution approving the County's entry into the CLEA. In December 1998, the State received a letter from the Tooele County Attorney who was of the opinion that, under the CLEA, the County is not obligated to provide law enforcement protection to PFS or its proposed storage site. The Board denied

² State of Utah's Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan, January 3, 1998.

as untimely the State's December 1998 attempt to amend Utah Security-C based on the Tooele County Attorney's letter. See LBP-99-7, 49 NRC 124 (1999).

PFS's September 1999 motion for summary disposition, relying on passage by Tooele County of a resolution approving the County's entry into the CLEA, requested dismissal of Utah Security-A and Security-B and, in part, Security-C. The Board, ruling that the County had rectified any procedural deficiencies in entering into the CLEA, granted PFS's motion. LBP-99-31, 50 NRC 147 (1999).

The remaining issue in Utah Security-C -- whether the Tooele County Sheriff could provide timely response to the PFS facility -- was set to be heard on February 29, 2000. Prior to the hearing, the State advised the Board that, given the limited issue the Board had admitted for hearing, the State saw no purpose in going forward with the Utah Security-C hearing because the State's real security concerns would not be heard. State of Utah's Notification of its decision not to go forward with Utah Security-C (February 14, 2000). In particular, the State took issue with the notion that a CLEA conferred jurisdiction on the Tooele County Sheriff for law enforcement activities relating to the PFS facility on the Skull Valley Reservation. *Id.* at 4. On February 29, 2000, the Board dismissed Security-C. LBP-00-05, 51 NRC 64 (2000).

On March 15, 2001, Utah's Governor signed into law Senate Bill 81, "Provisions Relating to High-Level Nuclear Waste."³ This legislation, *inter alia*, amends Utah Code Annotated §§ 17-27-102, 17-34-1, 19-3-301(6) and 19-3-303 and prohibits a county from

³ See Letter from Governor Leavitt dated March 15, 2001 to President Mansell and Speaker Stephens, attached hereto as Exhibit 1.

entering into or implementing a contract to provide municipal-type services, including law enforcement, to any area under consideration for a storage facility or transfer facility for the placement of high level nuclear waste.⁴

CONTENTION Security J. Law Enforcement.

The Applicant's Physical Security Plan does not comply with 10 CFR Part 73 because the Applicant does not have valid documented liaison with a designated local law enforcement authority (LLEA), and redundant communications between onsite security force members and the LLEA, to provide timely response to unauthorized penetrations at the PFS facility. See 10 CFR §§ 72.180; 73.51(d)(6), (8) and (12); and Part 73, Appendix C.

BASIS:

Part 72 applicants must establish, maintain and follow a physical protection plan as described in § 73.51, and a safeguards contingency plan as described in Part 73, Appendix C. 10 CFR §§ 72.180, 72.184. PFS is requesting a specific license to store spent nuclear fuel in an ISFSI and, thus, is subject to the physical protection requirements of section 73.51 at the PFS facility. 10 CFR § 73.51(a)(1)(i).

The general performance objective of section 73.51 is for a licensee to provide "high assurance that activities involving spent nuclear fuel and high-level radioactive waste do not constitute an unreasonable risk to public health and safety." 10 CFR § 73.51(b)(1). To meet the general performance objective, a licensee must have the performance capability of

⁴ Relevant portions of Utah Senate Bill 81,S2, are attached hereto as Exhibit 2.

storing spent nuclear fuel only in a protected area; granting access to a protected area to only those individuals authorized to enter that area; detecting and assessing unauthorized penetrations; providing timely communication to a designated response force; and managing the physical protection organization to maintain its effectiveness. Id. § 73.51(b)(2).

Methods acceptable to NRC for a licensee to meet the performance capabilities are contained in section 73.51(d) and includes:

Documented liaison with a designated response force or local law enforcement agency (LLEA) must be established to permit timely response to unauthorized penetration or activities.

Id. at (6); *see also* 10 CFR Part 73, App. C, Contents of Plan at (3)(d). Other methods include a timely means of assessment of alarms; and redundant communications capability between onsite security force members and designated response force or LLEA. 10 CFR § 73.51(b)(3) and (8). Furthermore, the licensee's physical protection program must be reviewed once every 24 months and must include an evaluation of the effectiveness of the physical protection system and a verification of the liaison established with the designated response force of LLEA. Id. at (12). PFS cannot now meet these performance capabilities.

The Board found that PFS has response arrangements with the Tooele County Sheriff's Office, the local law enforcement agency (LLEA). LBP98-13, 47 NRC 360, 363 (1998). Thus, to meet the documented liaison and timely response requirements of Part 73, and potentially other requirements of section 73.51(b), PFS must rely on the Tooele County Sheriff's Office to provide timely law enforcement assistance to its facility.

In ruling on the admissibility of Contention Security-C, the Board found that the State did not present a supportable legal or factual challenge to the existence of a law

enforcement agreement among Tooele County, the BIA and the Band. 47 NRC at 370. The State now presents such a challenge.

On March 15, 2001, the State enacted into law certain provisions relating to high level nuclear waste. See Exhibit 2. Under the newly enacted law, before implementing or executing “any agreement or contract to provide goods and services to any storage facility or transfer facility for high-level nuclear waste, or greater than class C radioactive waste,” a county must comply with certain mandatory provisions of the law. Utah Code Ann. § 17-27-102(2). In addition, pursuant to Utah Code Ann. § 17-34-1(3) a county may not:

- (a) provide, contract to provide, or agree in any manner to provide municipal-type services, as these services are defined in Section 19-3-303, to any area under consideration for a storage facility or transfer facility for the placement of high-level nuclear waste, or greater than class C radioactive waste; or
- (b) seek to fund services for these facilities by:
 - (i) levying a tax; or
 - (ii) charging a service charge or fee to persons benefitting from the municipal-type services.

The definition of “municipal-type services” in Utah Code Ann. § 19-3-303(6) includes but is not limited to:

- (a) fire protection service;
- (b) waste and garbage collection and disposal;
- (c) planning and zoning;
- (d) street lighting;
- (e) life support and paramedic services;
- (f) water;
- (g) sewer;
- (h) electricity;
- (i) natural gas or other fuel; or
- (j) law enforcement.

Furthermore, “[p]olitical subdivisions of the State may not enter into any contracts

or any other agreements for the purpose of providing any goods, services, or municipal-type services” to a high level waste storage facility. Utah Code Ann. § 19-3-301(6)(b). Under the 2001 law, any new or existing contract or agreement to provide goods, services or municipal-type services to any entity involved in placement of high-level nuclear waste at a storage or transfer facility within the State of Utah is against the public interest and is void from its inception. *Id.* at (9). Accordingly, the CLEA which the County entered into with the Skull Valley Band of Goshutes and the BIA to provide law enforcement services on the Skull Valley Reservation is subject to this new law.

The record in this proceeding is that the scope of the CLEA encompasses the provision of law enforcement services by Tooele County Sheriff’s Office to the PFS facility located on the Skull Valley Reservation. See Background Section *supra*. There can be no doubt that the CLEA is invalid as it relates to the PFS facility. First, the Cooperative Law Enforcement Agreement, on its face, is an “agreement” or “contract.” Second, the agreement is to provide law enforcement services, a sub-set of “municipal-type services.” Third, the service to be provided, as it relates to the PFS facility, is to a storage facility or transfer facility for the placement of high-level nuclear waste. Accordingly, Tooele County’s provision of law enforcement services under the CLEA as it relates to the PFS facility is void as against public policy in the State of Utah.

The enactment of laws prohibiting a county from providing law enforcement services to a high level nuclear waste storage facility means that PFS does not have the performance capability to provide high assurance that its activity involving spent nuclear fuel does not constitute an unreasonable risk to public health and safety because a method

acceptable to the NRC to meet the performance capability -- documented liaison with an LLEA to permit timely response to unauthorized penetration or activities -- does not exist. Moreover, under 10 CFR § 73.51(b)(12) the requirement for an established liaison with an LLEA is ongoing and its effectiveness must be reviewed once every 24 months. Even if the Board found that PFS had such a documented liaison in the past, such a finding should not preclude admission of this contention given the requirements of section 73.51(b)(12).

Finally, the supporting information, Exhibits 1 and 2, are sufficient to provide the contention with an admissible basis without the need for expert opinion support. In reviewing the security contentions the State filed in 1998, the Board held that once having access to PFS's physical security plan "expert opinion support is not required for a contention, at least as long as there is other supporting information sufficient to provide the contention with an admissible basis." LBP98-13, 47 NRC 360, 367 (1998). Therefore, the State submits there is a supportable basis to find Contention Utah Security J admissible.

LATE-FILED FACTORS

The State meets the 10 CFR § 2.714(a) late-filed factors for proposing its Contention Utah Security J.

Good Cause: The State has good cause for late filing Utah Security J. The law prohibiting the county from providing law enforcement service to a high level nuclear waste facility became effective on March 15, 2001. See Exhibit 1, and Exhibit 2 (Section 17). Thus, the State is filing this contention within thirty days of the effective date of the information relied upon to support this contention.

On numerous occasions in this proceeding the State has raised its concerns about the jurisdictional authority and resource capability of Tooele County to provide timely and effective law enforcement service to the PFS facility. The State has not pre-authorized the use of any State resources to assist the County in fulfilling any future private contractual obligations in providing law enforcement to the PFS facility. The Board did not accept these argument in the past but under the new law such law enforcement contracts and assistance are prohibited. Thus, the State has good cause for now filing this contention.

Development of a Sound Record: Utah Security J challenges whether PFS can meet the requirements of Part 73 based on the LLEA not encompassing the PFS facility. No party other than the State will present this important issue to the Board and thus, the State's participation will assist in developing a sound record. As described above, the State has provided documentary support for this contention.

Availability of Other Means for Protecting The State's Interests: The State has no alternative means, other than this proceeding, of protecting its interest. The State has significant concerns about the unreasonable risk to public health and safety if PFS cannot provide assurance of the availability of law enforcement assistance to the PFS facility.

Representation by Another Party: The State's position will not be represented by any other party, as there is no other party in this proceeding who has an admitted contention relating to law enforcement.

Broadening of Issues or Delay of the Proceeding: The admission of late-filed Utah Security J should not broaden the proceeding because Utah Security J may be accommodated in the existing schedule with the remaining Group III contentions. Thus,

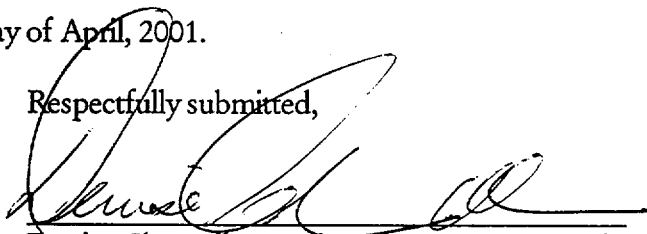
the licensing proceeding should not be delayed. Moreover, safety concerns outweigh any broadening or delay in the proceeding.

CONCLUSION

For the foregoing reasons, Contention Utah Security J meets the Commission's standard for late filed contentions and, thus, should be admitted.

DATED this 13th day of April, 2001.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S REQUEST FOR ADMISSION OF LATE-FILED CONTENTION UTAH SECURITY J (Law Enforcement) was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 13th day of April 2001:

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

Denise Chancellor
Assistant Attorney General
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Chapter 107
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Upon 277, p 438

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OLENE S. WALKER
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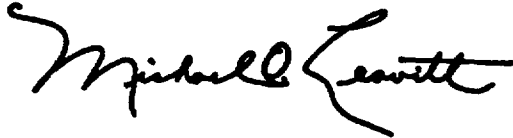
March 15, 2001

Honorable L. Alma Mansell
President of the Senate
and
Honorable Martin R. Stephens
Speaker of the House
BUILDING MAIL

Dear President Mansell and Speaker Stephens:

This is to inform you that on March 15, 2001, I have signed Senate Bill SB0081, ⁵²Provisions Relating to High-level Nuclear Waste, of the 2001 General Session of the Fifty-Fourth Legislature and have forwarded this to the Lieutenant Governor for filing.

Sincerely,

A handwritten signature in black ink, reading "Michael O. Leavitt". The signature is fluid and cursive, with the first name "Michael" and last name "Leavitt" clearly distinguishable.

Michael O. Leavitt
Governor

PROVISIONS RELATING TO HIGH-LEVEL NUCLEAR WASTE

2001 GENERAL SESSION

STATE OF UTAH

Sponsor: Terry R. Spencer

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 17-27-102 is amended to read:

17-27-102. Purpose.

(1) To accomplish the purpose of this chapter, and in order to provide for the health, safety, and welfare, and promote the prosperity, improve the morals, peace and good order, comfort, convenience, and aesthetics of the county and its present and future inhabitants and businesses, to protect the tax base, secure economy in governmental expenditures, foster the state's agricultural and other industries, protect both urban and nonurban development, and to protect property values, counties may enact all ordinances, resolutions, and rules that they consider necessary for the use and development of land within the county, including ordinances, resolutions, and rules governing uses, density, open spaces, structures, buildings, energy-efficiency, light and air, air quality, transportation and public or alternative transportation, infrastructure, public facilities, vegetation, and trees and landscaping, unless those ordinances, resolutions, or rules are expressly prohibited by law.

(2) A county shall comply with the mandatory provisions of this part before any agreement or contract to provide goods, services, or municipal-type services to any storage facility or transfer facility for high-level nuclear waste, or greater than class C radioactive waste, may be executed or implemented.

....

Section 5. Section 17-34-1 is amended to read:

17-34-1. Counties may provide municipal services -- First class counties required to provide paramedic services.

(1) For purposes of this chapter, [~~"municipal-type"~~] except as otherwise provided in Subsection (3):

(a) "Greater than class C radioactive waste" has the same meaning as in Section 19-3-303.

(b) "High-level nuclear waste" has the same meaning as in Section 19-3-303.

(c) "Municipal-type services" means:

[~~(a)~~] (i) fire protection service;

[~~(b)~~] (ii) waste and garbage collection and disposal;

~~[(c)]~~ (iii) planning and zoning;
~~[(d)]~~ (iv) street lighting;
~~[(e)]~~ (v) in a county of the first class, advanced life support and paramedic services; and
~~[(f)]~~ (vi) all other services and functions that are required by law to be budgeted, appropriated, and accounted for from a municipal services fund or a municipal capital projects fund as defined under Chapter 36, Uniform Fiscal Procedures Act for Counties.

(d) "Placement" has the same meaning as in Section 19-3-303.

(e) "Storage facility" has the same meaning as in Section 19-3-303.

(f) "Transfer facility" has the same meaning as in Section 19-3-303.

(2) A county may:

(a) provide municipal-type services to areas of the county outside the limits of cities and towns without providing the same services to cities or towns;

(b) fund those services by:

(i) levying a tax on taxable property in the county outside the limits of cities and towns; or

(ii) charging a service charge or fee to persons benefitting from the municipal-type services.

(3) A county may not:

(a) provide, contract to provide, or agree in any manner to provide municipal-type services, as these services are defined in Section 19-3-303, to any area under consideration for a storage facility or transfer facility for the placement of high-level nuclear waste, or greater than class C radioactive waste; or

(b) seek to fund services for these facilities by:

(i) levying a tax; or

(ii) charging a service charge or fee to persons benefitting from the municipal-type services.

~~[(3)]~~ (4) Each county of the first class shall provide advanced life support and paramedic services to the area of the county outside the limits of cities and towns.

....

Section 8. Section 19-3-301 is amended to read:

19-3-301. Restrictions on nuclear waste placement in state.

(6) (a) State agencies may not, for the purpose of providing any goods, services, or municipal-type services to a storage facility or transfer facility, or to any organization engaged in the transportation of waste, enter into any contracts or any other agreements prior to:

(i) the satisfaction of the conditions in Subsection (4); and

(ii) the executive director of the department having certified that the requirements of

Sections 19-3-304 through 19-3-308 have been met for the purposes of a license application proceeding for a storage facility or transfer facility.

(b) Political subdivisions of the state may not enter into any contracts or any other agreements for the purpose of providing any goods, services, or municipal-type services to a storage facility or transfer facility, or to any organization engaged in the transportation of waste.

(c) This Subsection (6) does not prohibit a state agency from exercising the regulatory authority granted to it by law.

....

(9) (a) (i) Any contract or agreement to provide any goods, services, or municipal-type services to any organization engaging in, or attempting to engage in the placement of high-level nuclear waste or greater than class C radioactive waste at a storage facility or transfer facility within the state are declared to be against the greater public interest, health, and welfare of the state, by promoting an activity which has the great potential to cause extreme public harm.

(ii) These contracts or agreements under Subsection (9)(a)(i), whether formal or informal, are declared to be void from inception, agreement, or execution as against public policy.

(b) (i) Any contract or other agreement to provide goods, services, or municipal-type services to storage or transfer facilities may not be executed within the state.

(ii) Any contract or other agreement, existing or executed on or after the effective date of this act, is considered void from the time of agreement or execution.

Section 10. Section 19-3-303 is amended to read:

19-3-303. Definitions.

As used in this part:

(1) "Final judgment" means a final ruling or judgment, including any supporting opinion, that determines the rights of the parties and concerning which all appellate remedies have been exhausted or the time for appeal has expired.

(2) "Goods" means any materials or supplies, whether raw, processed, or manufactured.

[†] (3) "Greater than class C radioactive waste" means low-level radioactive waste that has higher concentrations of specific radionuclides than allowed for class C waste.

(4) "Gross value of the contract" means the totality of the consideration received for any goods, services, or municipal-type services delivered or rendered in the state without any deduction

for expense paid or accrued with respect to it.

~~[(2)]~~ (5) "High-level nuclear waste" has the same meaning as in Section 19-3-102.

(6) "Municipal-type services" includes, but is not limited to:

(a) fire protection service;

(b) waste and garbage collection and disposal;

(c) planning and zoning;

(d) street lighting;

(e) life support and paramedic services;

(f) water;

(g) sewer;

(h) electricity;

(i) natural gas or other fuel; or

(j) law enforcement.

(7) "Organization" means a corporation, limited liability company, partnership, limited liability partnership, joint venture, consortium, association, trust, or other entity formed to undertake an enterprise, whether or not for profit.

(8) "Placement" means transportation, transfer, storage, decay in storage, treatment, or disposal.

(9) "Political subdivision" means any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other governmental subdivision or public corporation.

~~[(3)]~~ (10) "Rule" means a rule made by the department under Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(11) "Service" or "services" means any work or governmental program which provides a benefit.
~~[(4)]~~ (12) "Storage facility" means any facility which stores, holds, or otherwise provides for the emplacement of waste regardless of the intent to recover that waste for subsequent use, processing, or disposal.

~~[(5)]~~ (13) "Transfer facility" means any facility which transfers waste from and between transportation modes, vehicles, cars, or other units, and includes rail terminals and intermodal transfer points.

~~[(6)]~~ (14) "Waste" or "wastes" means high-level nuclear waste and greater than class C radioactive waste.

....

Section 17. Effective date.

If approved by two-thirds of all the members elected to each house, this act takes effect upon approval by the governor, or the day following the constitutional time limit of Utah Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto, the date of veto override.