

April 27, 2001

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, L.L.C. |) | |
| |) | ASLBP No. 97-732-02-ISFSI |
| (Independent Spent |) | |
| Fuel Storage Installation) |) | |

NRC STAFF'S RESPONSE TO STATE OF UTAH'S
REQUEST FOR ADMISSION OF LATE-FILED
CONTENTION UTAH SECURITY-J

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c) and the Atomic Safety and Licensing Board's "Order (Schedule for Responses to Late-Filed Contention Security-J)," dated April 16, 2001, the NRC Staff ("Staff") hereby responds to the "State of Utah's Request for Admission of Late-Filed Contention Utah Security-J (Law Enforcement)," dated April 13, 2001 ("Request"). For the reasons set forth below, the Staff does not oppose the admission of this contention.

BACKGROUND

On June 25, 1997, Private Fuel Storage, L.L.C. ("PFS" or "Applicant"), filed an application for a license to possess and store spent nuclear fuel ("SNF") in an Independent Spent Fuel Storage Installation ("ISFSI") to be constructed and operated on the Reservation of the Skull Valley Band of Goshute Indians located within the boundaries of Utah. The application included five documents: a license application, safety analysis report, environmental report, emergency plan, and as pertinent here, a Physical Security Plan ("PSP" or "Security Plan").

On July 31, 1997, the Commission published in the *Federal Register* a Notice of Consideration and Notice of Opportunity for Hearing ("Notice") concerning the license application.

See 62 Fed. Reg. 41,099 (1997). Petitions for leave to intervene and numerous contentions were then filed by various petitioners including the State of Utah ("State"), among which were nine contentions filed by the State concerning the Applicant's Security Plan.¹

On June 29, 1998, the Licensing Board ruled upon the admissibility of the State's Security Plan contentions. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360 (1998).² The Board rejected eight of the State's PSP contentions, and admitted one contention (Contention Security-C) to the extent it asserted that the Tooele County Sheriff's Office -- PFS's designated Local Law Enforcement Agency ("LLEA") -- will not provide a "timely response" to unauthorized activities at the PFS facility, as required by 10 C.F.R. Part 73. *Id.* at 369-70, 373-74. Subsequently, the Board granted the State's request for reconsideration and admitted Contentions Security-A, Security-B and Security-C, insofar as they alleged that Tooele County's adoption of a Cooperative Law Enforcement Agreement ("CLEA") with the Skull Valley Band and the U.S. Bureau of Indian Affairs ("BIA") was invalid because the CLEA had not been approved by a County Resolution as required under Utah law. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69 (1998).

In June 1999, PFS filed a motion seeking summary disposition of Contentions Security-A, Security-B and Security-C (in part), based on a showing that after these contentions were admitted, the Tooele County Board of Commissioners adopted a resolution approving the County's entry into the CLEA as required under Utah law. On August 27, 1999, the Licensing Board granted PFS's motion, ruling that the County had corrected any procedural deficiencies that affected the County's

¹ "State of Utah's Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan," dated January 3, 1998.

² Previously, in a Memorandum and Order issued on April 22, 1998, the Licensing Board ruled on the petitions to intervene and admissibility of contentions involving matters other than the PFS Security Plan. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1998).

execution of the CLEA. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-31, 50 NRC 147 (1999).³ One Security Plan issue then remained for hearing -- *i.e.*, the assertion in Contention Security-C that the Tooele County Sheriff would not provide a timely response to the PFS facility. However, on February 14, 2000, the State advised the Board that it did not wish to proceed to hearing on this issue; accordingly, on February 29, 2000, the Board dismissed Contention Security-C. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-05, 51 NRC 64 (2000). As a result, no issues remained to be heard concerning the PFS Security Plan.

On April 13, 2001, the State filed the instant request for admission of late-filed Contention Utah J (Law Enforcement), asserting that Tooele County is prohibited from providing law enforcement assistance to the PFS storage facility or transfer facility, and that PFS therefore fails to comply with various physical security plan requirements in 10 C.F.R. Parts 72 and 73. In support of this claim, the State asserted that on March 15, 2001, the Governor of Utah signed into law Utah Senate Bill 81 (S.B. 81) which, *inter alia*, prohibits a county from providing various municipal-type services (including law enforcement) to any high level nuclear waste storage facility or transfer facility within the State of Utah.

DISCUSSION

A. Legal Standards for Late-Filed Contentions.

The criteria to be considered when determining the admissibility of a late-filed contention are set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v), as follows:

- (i) Good cause, if any, for failure to file on time.

³ In a previous decision, the Licensing Board rejected as untimely the State's December 1998 attempt to amend Contention Security-C based on a letter from the Tooele County Attorney stating his opinion that, under the CLEA, the County is not obligated to provide law enforcement protection at the PFS facility. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-7, 49 NRC 124 (1999).

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

It has long been held that the first factor, good cause for lateness, carries the most weight in the balancing test. See *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 295 (1993). Absent a showing of good cause, a petitioner must make a compelling showing that the remaining factors outweigh the lack of good cause for the untimely filing. See *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). Two factors -- the availability of other means to protect the petitioner's interest and the ability of other parties to represent the petitioner's interest -- are less important than the other factors, and are therefore entitled to less weight. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 74 (1992). With respect to the third factor (the potential contribution to the development of a sound record), petitioners are to provide a "real clue about what they would say to support the contention beyond the minimal information they provide for admitting the contention." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) LBP-98-7, 47 NRC 142, 208-09 (1998). Finally, a petitioner must meet the requirements for setting forth a valid contention, as stated in 10 C.F.R. § 2.714(d)(2).

An evaluation of these criteria leads the Staff to believe that a balancing of these factors supports the admission of this contention. Specifically, three factors favor the admission of the contention: (a) good cause exists for the late filing of this contention, in that the State filed Contention Security-J within 30 days after S.B. 81 was enacted; (b) the State's interest is not represented by existing parties with respect to this issue; and (c) the State's participation may

assist in developing a sound record, in that the contention raises a question of law which the State is qualified to address. Two other factors weigh against the admission of this contention: (d) other means are available whereby the State's interest will be protected, in that the validity of the Utah law is currently the subject of litigation in U.S. District Court;⁴ and (e) the admission of this contention will broaden the issues and result in delay in the proceeding. Accordingly, a balancing of these factors appears to support the admission of Contention Utah Security-J.

B. Legal Standards for Admission of Contentions

In order for a contention to be admitted to a proceeding, the requirements of 10 C.F.R. § 2.714 must be met. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333 (1999); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996). A contention must meet the standards set forth in 10 C.F.R. § 2.714(b)(2), which provides that each contention must consist of a "specific statement of the issue of law or fact to be raised or controverted" and must be accompanied by:

- (i) A brief explanation of the bases of the contention;
- (ii) A concise statement of the alleged facts or expert opinion which supports the contention . . . together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion;
- (iii) Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact.

10 C.F.R. § 2.714(b)(2). The failure of a contention to comply with any one of these requirements is grounds for dismissing the contention. See 10 C.F.R. § 2.714(d)(2)(i); *Arizona Public*

⁴ PFS and the Skull Valley Band recently filed an action in the U.S. District Court for the District of Utah in which they, *inter alia*, (a) seek a declaratory judgment that various provisions of Utah law (S.B. 78, 196, 66, 164, 177 and 81) are unconstitutional, void, and/or preempted by Federal and tribal law; and (b) request injunctive relief against the enforcement of those laws. See "Skull Valley Band of Goshute Indians and Private Fuel Storage, L.L.C. v. Michael O. Leavitt, *et al.*, Case No. 2:01CV00270C (Complaint filed April 19, 2001).

Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155-56 (1991); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 178-181 (1998).⁵

C. The Admissibility of Contention Utah Security-J.

In Contention Security J, the State asserts as follows:

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.

Request at 4. In support of this contention, the State asserts that on March 15, 2001, the Governor of Utah signed into law Senate Bill 81 ("Provisions Relating to High-Level Nuclear Waste") which, *inter alia*, "prohibits a county from 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." *Id.* The State provided a

⁵ With respect to documentary or other factual information or expert opinion alleged to provide the basis for a contention, the Licensing Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention. In the case of a document, the Board should review the information provided to ensure that it does indeed supply a basis for the contention. See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989); *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990); see also *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996) (a document put forth by an intervenor as the basis for a contention is subject to scrutiny both for what it does and does not show). Contentions that are not supported by some alleged fact or facts should not be admitted, nor should the full adjudicatory hearing process be triggered by contentions that lack a factual and legal foundation. *Oconee*, CLI-99-11, 49 NRC at 334-35, *citing Final Rule*, "Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,172 (1989). Finally, a contention must show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2)(iii); *Oconee*, CLI-99-11, 49 NRC at 333-34. "The intervenor must 'be able to identify some facts at the time it proposes a contention to indicate that a dispute exists between it and the applicant on a material issue.'" *Id.* at 335, *citing* 54 Fed. Reg. at 33,171.

letter from Utah Governor Michael O. Leavitt dated March 15, 2001, attesting to his action (Request, Exh. 1), as well as a copy of pertinent provisions of S.B. 81 (Request, Exh. 2).

As modified in S.B. 81, Utah Code Ann. § 17-34-1(3) states that a county may not “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”; and Utah Code Ann. § 19-3-303(6) defines “municipal-type services” to include “law enforcement” services. Further, Utah Code Ann. § 19-3-301(6)(b) mandates that “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 high level waste storage facility. Finally, the statute declares that any new or existing 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.*

These statutory provisions are relevant, according to the State, because PFS has identified the Tooele County Sheriff's Office as its Local Law Enforcement Agency (“LLEA”), pursuant to a Cooperative Law Enforcement Agreement entered into by Tooele County with BIA and the Skull Valley Band; S.B. 81 would prohibit the County from implementing that agreement or executing any new agreement to provide law enforcement services to the PFS facility. Further, the State asserts that these statutory provisions invalidate PFS's designation of Tooele County to serve as its LLEA, thus calling into question PFS's compliance with applicable NRC physical protection requirements.

The Commission's regulations governing physical protection for an away-from-reactor ISFSI are set forth in 10 C.F.R. Parts 72 and 73. Pursuant to 10 C.F.R. §§ 72.180 and 72.184, an applicant for an ISFSI under Part 72 (like PFS) must “establish, maintain and follow a detailed plan for physical protection as described in § 73.51” and “a safeguards contingency plan for responding to threats and radiological sabotage” as described in 10 C.F.R. Part 73, Appendix C.

Detailed requirements for physical protection at an away-from-reactor ISFSI are provided in 10 C.F.R. § 73.51. An applicant must “establish and maintain a physical protection system with the objective of providing 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 this general objective, the applicant must meet the performance capabilities specified in § 73.51(b)(2), including the provision of “timely communication to a designated response force whenever necessary.” Specific methods for meeting the performance capabilities of § 73.51(b)(2) are specified in § 73.51(d); as pertinent here, these include:

(6) 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.

* * *

(8) Redundant communications capability must be provided between onsite security force members and designated response force or LLEA.

* * *

(10) Written response procedures must be established and maintained for addressing unauthorized penetration of, or activities within, the protected area, including Category 5, “Procedures,” of appendix C to part 73. . . .

* * *

(12) The physical protection plan must be reviewed once every 24 months The physical protection review must include an evaluation of the effectiveness of the physical protection system and a verification of the liaison established with the designated response force or LLEA.

In addition, 10 C.F.R. Part 73, Appendix C, provides specific requirements for a licensee’s safeguards contingency plan, including a requirement to describe a set of pre-determined decisions and actions for responding to threats, thefts and sabotage, and to stipulate the individual, group

or entity responsible for each decision and action, in part “to ensure the integration of the licensee response with the responses by other entities.” The plan is to include, *inter alia*:

d. Law Enforcement Assistance -- A listing of available local law enforcement agencies and a description of their response capabilities and their criteria for response; and a discussion of working agreements or arrangements for communicating with these agencies.

10 C.F.R. Part 73, Appendix C, “Contents of the Plan,” § 3.d.

In the Staff’s view, S.B. 81 appears to prohibit Tooele County from agreeing to serve or serving as the designated LLEA for the PFS facility. Inasmuch as PFS’s Security Plan designates Tooele County as its LLEA, the enactment of this statute calls into question PFS’s present compliance with 10 C.F.R. § 73.51 and Part 73, Appendix C. Accordingly, in the absence of any determination that the Utah law is unconstitutional or preempted by Federal law (*see* n. 4, *supra*), or any revision of the Security Plan to account for this development, the contention appears to present an admissible issue as to whether Tooele County may serve as the designated LLEA for the PFS facility -- at least at this contention pleading stage, subject to subsequent resolution on the merits. *See* 10 C.F.R. §§ 2.714(e), 2.749 or 2.760.

The Staff notes, however, that it does not agree with the State’s assertion that, “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.” Request at 5; emphasis added. The Commission’s regulations, set forth above, do not explicitly mandate that an away-from-reactor ISFSI applicant must secure an agreement by offsite law enforcement authorities to serve as the LLEA for its facility. Rather, the regulations appear to contemplate that an applicant may rely upon either a designated “response force” or a “local law enforcement agency” to provide the required

timely response at the facility.⁶ Thus, PFS could revise its Security Plan to account for the possibility that Tooele County may not serve as the LLEA for the PFS facility.

Further, the Commission has stated, in the context of radiological emergency planning, that it “will recognize the reality that in an actual emergency, state and local government officials will exercise their best efforts to protect the health and safety of the public.” 10 C.F.R. § 50.47(c)(1)(iii). *Cf. Massachusetts v. United States*, 856 F.2d 378, 383 (1st Cir. 1988); Statement of Consideration, 52 Fed. Reg. 42,078 (Nov. 3, 1987); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22 (1986). Although this “realism doctrine” has not yet been applied outside the realm of nuclear reactor emergency plans, the doctrine may be relevant to a determination as to whether PFS’s Security Plan (or any future revision thereof) satisfies the physical protection requirements of 10 C.F.R. Parts 72 and 73.

CONCLUSION

For the reasons set forth above, the Staff does not oppose the admission of Contention Utah Security-J.

Respectfully submitted,

/RA/

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 27th day of April 2001

⁶ The Commission recently observed that it “never intended that onsite physical protection personnel at an ISFSI would provide a response to a safeguards event other than calling for assistance from local law enforcement or other designated response force unless their timely response could not be ensured” -- and that while § 73.51(d)(6) requires timely response from “the designated response forces,” “[i]f timely response cannot be provided, additional protective measures may be required, to include use of armed guards.” See Statement of Consideration, “Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste,” 63 Fed. Reg. 26,955, 26,957, 26,959 (May 15, 1998). Thus, reliance upon an LLEA may not be strictly required.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO STATE OF UTAH'S REQUEST FOR ADMISSION OF LATE-FILED CONTENTION UTAH SECURITY-J" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 27th day of April, 2001:

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