

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

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

May 29, 2001

MEMORANDUM AND ORDER(Ruling on Discovery Motions and
Request to Extend Time to Complete Depositions)

Pending with the Licensing Board are several filings relating to discovery being conducted regarding contention OGD O, Environmental Justice Issues are Not Addressed. One is a May 7, 2001 request by applicant Private Fuel Storage, L.L.C., (PFS) that we compel intervenor Ohngo Gaudadeh Devia (OGD) to answer certain interrogatory requests, which OGD opposes in a May 14, 2001 responsive pleading. Another is a May 17, 2001 PFS request for a protective order relative to the proposed continuation of the deposition of Leon D. Bear, which engendered an OGD response on May 24, 2001. Additionally, the Board has pending a May 11, 2001 joint OGD/PFS motion to extend the time for completing OGD depositions of PFS witnesses relating to contention OGD O and a May 25, 2001 PFS motion for leave to file a reply to the OGD May 24, 2001 answer to the May 17, 2001 PFS motion for a protective order, which is accompanied by the PFS reply pleading. For the reasons set forth below, we permit the PFS reply to be lodged in the record and deny the PFS motion to compel, the PFS protective order motion, and the motion for an extension of time to complete witness depositions.

A. PFS Motion to Compel

Although the Board could spend several pages describing the procedural background relating to the May 7, 2001 PFS motion to compel at issue before us, suffice it to say that this PFS request is the culmination of a series of filings over the past several months in which PFS has sought discovery information from OGD including, among other things, answers to certain interrogatories relating to contention OGD O. Still at issue are two PFS interrogatories -- Nos. 8 and 9 -- that originally were part of a PFS February 6, 2001 discovery request. These interrogatories state:

With respect to the claims raised in OGD O:

8. In OGD's comments on the [June 2000 NRC staff draft environmental impact statement (DEIS)], OGD asserts that a majority of the Band does not support the PFS ISFSI. If OGD contends that its assertion falls within the scope of Contention OGD O, specifically identify the bases for the assertion; in any event specify the reason(s) for disagreeing with the DEIS conclusion that the PFS project would result in a net increase in Band members living on the Reservation (see, e.g., page 9-36 of the DEIS).
9. Identify and fully explain each specific respect in which OGD claims that the Draft Environmental Impact Statement does not adequately consider any of the environmental justice claims previously raised by OGD in Contention OGD O as admitted by the Board.

[PFS] Second Set of Formal Discovery Requests to Intervenor OGD (Feb. 16, 2001) at 3 (footnote omitted).

PFS makes three separate claims relative to these two interrogatories. First, in connection with Interrogatory No. 8, PFS asserts that OGD has failed to specify its basis for its assertion that a majority of the Skull Valley Band of Goshute Indians (Skull Valley Band) does not support the PFS facility. Although in response to this interrogatory OGD previously has

provided a list of documents from the docket of a 1998 federal district court case, Utah v. Department of the Interior, Docket No. 2:98CV380K (D. Utah), in which OGD and PFS are both parties, PFS declares that some of these documents are voluminous so as to require it to sift through a mass of information and guess about the basis for the claim in contention OGD O that is at issue. See [PFS] Motion for Entry of Order Compelling Intervenor OGD to Answer [PFS] Discovery Requests (May 7, 2001) at 5 [hereinafter PFS Motion to Compel]. In its May 14, 2001 response to the May 7, 2001 PFS motion to compel, however, OGD has provided an additional response that specifies paragraphs, along with associated exhibits, in that federal court complaint, as well as in the complaint in a recently-filed May 2001 federal district court case, Blackbear v. Norton, Docket No. 2:01CV317C (D. Utah), that it asserts respond to this inquiry. In light of this additional specification, we deny this portion of the May 7, 2001 PFS motion to compel.

Regarding Interrogatory Nos. 8 and 9, PFS further declares that OGD should provide clear answers to the PFS request to specify (1) the reasons OGD disagrees with the DEIS conclusion, as set forth in the DEIS on pages such as 9-36, that the facility would result in a net benefit increase to Skull Valley Band members living on the reservation (Interrogatory No. 8); and (2) the specific respects in which the DEIS does not adequately consider any of the environmental justice claims raised by OGD as set forth in admitted contention OGD O (Interrogatory No. 9). Specifically, PFS challenges as too vague OGD's use of the phrase "other issues relevant to the facility" in answering these interrogatories. For its part, OGD claims that in a May 4, 2001 response defining this phrase as "the improper changes in purported tribal government and associated improper actions caused by PFS's bypassing the Tribes legitimate government and conducting improper dealings with and support of unauthorized persons in usurping illegitimate power, leading to corruption and disparate

adverse impacts,” it provided all the specificity needed because “PFS is intimately knowledgeable concerning the details of these allegations, which are major issues in the litigation where PFS is and has been an active responsive party.” [OGD] Response to [PFS] Motion for Entry of Order to Compel (May 14, 2001) at 4-5.

From this response, we read OGD to be stating that the “issues” it is describing are the “changes,” “actions,” and “dealings” that are specifically enumerated in the May 4, 2001 complaint and listed accompanying exhibits in Blackbear v. Norton, a copy of which was provided as exhibit two to the May 17, 2001 PFS motion for protective order. With this understanding, we deny this aspect of the May 7, 2001 PFS motion to compel.¹

Finally, in connection with Interrogatory No. 9, PFS asks that OGD be compelled to specify all the disproportionate adverse impacts it asserts were inadequately addressed in the NRC staff’s June 2001 DEIS. The genesis of this dispute apparently is a portion of the March 8, 2001 OGD response to this question that stated that the DEIS is deficient in failing “to analyze adequately or at all the fact that . . . 2) the operation and construction of the proposed facility will have disproportionate adverse impacts on the Skull Valley Band, including its cultural integrity, the perpetuation of its language and traditions and its relationship to its lands” [OGD] Supplemental Responses to [PFS] First Set of Discovery Requests and Initial Responses to [PFS] Second Set of Discovery Requests (Mar. 8, 2001) at 4-5. PFS claims the use of the term “including” in this answer fails to provide the necessary specificity, a situation that was not corrected by OGD’s further explanation that

“any health or environmental risk can potentially present a disproportionate risk depending on the circumstances of the risk and the conditions and factors at play in the interaction of these circumstances, with the low income and minority populations.”

¹ If the Board is wrong in this regard, OGD should take immediate steps to correct our misunderstanding by specifically enumerating what “issues” it is referring too.

PFS Motion to Compel at 6 (quoting [OGD] Second Additional Response to [PFS] (Renewed) Motion to Compel at 4). In its response, OGD reiterates this explanation and declares that the DEIS “did not consider disproportionate risk with respect to any of the potential risks [the DEIS] analyzed.” [OGD] Response to [PFS] Motion for Entry of Order to Compel (May 14, 2001) at 5.

From its response, we understand OGD to be stating that the “disproportionate adverse impacts” it asserts are not analyzed adequately, or at all, in the DEIS are (1) those affecting the Skull Valley Band’s cultural integrity, the perpetuation of its language and traditions, and its relationship to its lands; and (2) any other impacts that are specifically identified in the DEIS environmental justice discussions, see, e.g., Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, NUREG-1714, [DEIS] at 6-20 to -32, 6-38, 6-41, 6-47, 7-20 to -29. With this understanding, we also deny this aspect of the May 7, 2001 PFS motion to compel.²

B. PFS Motions for Protective Order and to File Reply/Joint Motion to Complete Witness Depositions

The dispute extant regarding the May 17, 2001 PFS motion for a protective order concerns the scope of any continued deposition of Leon D. Bear, who has been identified by PFS as a potential witness relative to contention OGD O. PFS asserts that during Mr. Bear’s May 3, 2001 deposition, OGD pursued lines of questioning regarding the internal affairs of the Skull Valley Band, including Band governance and financial matters, that are far removed from the environmental matters that are the subject of contention OGD O and requests that the Board issue a protective order that bars further questioning on such matters. For its part, OGD asserts that its questions were appropriate to explore Mr. Bear’s bias and bona fides, including

² If the Board is wrong in this regard, OGD should take immediate steps to correct our misunderstanding by specifically enumerating what “disproportionate adverse impacts” it is referring too.

his authority to present himself as tribal chairman relative to any testimony he may give regarding OGD O.

It is apparent that a central issue relative to this protective order motion is the propriety of OGD's interpretation of the scope of contention OGD O, specifically, its position that questions about Mr. Bear's status as chairman of the Skull Valley Band, his authority to act on behalf of the tribe, and the concomitant legitimacy of the existing tribal government and its actions relative to the PFS project are relevant to OGD's contention and OGD's claim that environmental justice matters have not been adequately addressed either by PFS or by the staff in the DEIS. This PFS discovery pleading, however, is not the only matter pending with the Board regarding this matter. On May 25, 2001, PFS filed a motion for summary disposition regarding this contention in which, among other things, PFS addresses this scope issue, likewise asserting that these OGD concerns are irrelevant to this issue statement and do not preclude the entry of a judgment in its favor on contention OGD O.

Under the circumstances, we believe the best forum for addressing this matter initially is in the context of the PFS summary disposition motion in which the parties' conflicting views on the scope of contention OGD O can be fully aired in the context of a evaluation of merits of this contention.³ Moreover, because PFS has not sought to support its motion with a declaration from Mr. Bear, it is a more efficient use of the Board's and the parties' time to defer any further deposition of Mr. Bear, which OGD indicates can be completed in one day, until the Board has

³ In this regard, in accordance with 10 C.F.R. § 2.749(a), OGD and any other party will have 20 days from the date of filing of the PFS dispositive motion to file a response, with a party opposing the motion having ten days thereafter to file a reply to any party response supporting the motion.

The Board notes that it anticipates that all parties to the proceeding will continue to honor the rules it has established regarding page limits for pleadings and the filing of motions to extend filing deadlines or page limits or for permission to file a reply pleading. See, e.g., LBP-98-7, 47 NRC 142, 246-47 (1998).

had an opportunity to address the pending PFS dispositive motion in which the outstanding dispute over the scope and continuing viability of contention OGD O could be resolved.

Accordingly, the May 17, 2001 PFS motion for protective order is denied, albeit without prejudice to any future determination the Board may make on the issues raised therein. Further, the May 11, 2001 OGD/PFS joint motion to extend the time to complete witness depositions is denied, albeit without prejudice to any showing OGD may wish to make in accordance with 10 C.F.R. § 2.749(c) regarding the need for further depositions. Finally, given our nonmerits disposition of the PFS motion for protective order, we need not rule on the May 25, 2001 PFS request for leave to file a reply, although we will permit the reply pleading that accompanied the PFS motion to remain lodged in the record of this proceeding.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁴

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

May 29, 2001

⁴ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PFS; (2) intervenors Skull Valley Band of Goshute Indians, OGD, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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PRIVATE FUEL STORAGE, L.L.C.)	Docket No. 72-22-ISFSI
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(Independent Spent Fuel Storage)	
Installation))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON DISCOVERY MOTIONS AND REQUEST TO EXTEND TIME TO COMPLETE DEPOSITIONS) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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TO EXTEND TIME TO COMPLETE
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of May 2001