

RAS 3134

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

LBP-01-20
DOCKETED 06/14/01
SERVED 06/14/01

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

June 14, 2001

MEMORANDUM AND ORDER

(Deferring Admissibility Ruling on Late-Filed Contention Security-J)

Pending before the Licensing Board is the April 13, 2001 request of intervenor State of Utah (State) to admit late-filed contention Security-J, Law Enforcement. In this issue statement, the State alleges that the physical security plan (PSP) of applicant Private Fuel Storage, L.L.C., (PFS) for its proposed Skull Valley, Utah independent spent fuel storage installation (ISFSI) is not in accord with the requirements of 10 C.F.R. Parts 72 and 73. Specifically, the State contends that PFS is unable to comply with the regulatory mandate that a "[d]ocumented liaison with a designated response force or local law enforcement agency (LLEA) must be established to permit timely response to unauthorized penetration or activities," 10 C.F.R. § 73.51(d)(6), because recently-adopted Utah legislation prohibits any state or local governmental entity from entering into such an arrangement relative to the PFS facility. In responses filed on April 27, 2001, PFS and the staff have taken different positions regarding the contention's admissibility. The former asserts the admission request should be denied while the latter interposes no objection to the late-filed contention's admission.

For the reasons set forth below, we defer any ruling on the State's request to admit contention Security-J pending resolution of ongoing federal district court litigation in which PFS contests the constitutionality of this legislation, or further order of the Board.

I. Background

The PFS license application for authorization to construct and operate its proposed Skull Valley ISFSI, which was filed in June 1997, includes, among other things, a PSP that addresses the requirements found in 10 C.F.R. Parts 72 and 73 regarding physical protection for the facility and its contents. See LBP-98-7, 47 NRC 142, 157, reconsideration granted in part and denied in part, LBP-98-10, 47 NRC 288, aff'd, CLI-98-13, 48 NRC 26 (1998). As part of its challenge to the PFS application, in January 1998 the State timely filed nine contentions -- labeled Security-A through Security-I -- regarding the PSP, and in a June 29, 1998 ruling, the Board admitted one -- contention Security-C -- for further litigation. In doing so, the Board limited contention Security-C to the State's assertion that PFS had not described the estimated response times for the Tooele County sheriff's office, which is the PFS-designated LLEA, to any unauthorized activities that might occur at the PFS facility as required by 10 C.F.R. Part 73, app. C. See LBP-98-13, 47 NRC 360, 369-70 (1998).

Thereafter, the State filed a timely motion seeking reconsideration of the Board's rulings regarding contentions Security-A, Security-B, and Security-C. The thrust of the State's argument concerning these contentions was that Tooele County's cooperative law enforcement agreement (CLEA) with intervenor Skull Valley Band of Goshute Indians (Skull Valley Band), upon whose Skull Valley reservation the PFS facility is to be located, and the United States Department of the Interior's Bureau of Indian Affairs (BIA), to provide law enforcement services was invalid. The problem, according to the State, was that Tooele County had failed to provide

its approval of the agreement by an “appropriate” county resolution that, as required by Utah law, had been put forth in writing before a vote was taken. The Board ruled that the State had put forth sufficient grounds for reconsideration of contentions Security-A, Security-B, and Security-C to the degree they involved issues of training, equipment, and staffing deficiencies that turned on whether a legitimately-adopted CLEA existed with Tooele County that would permit the County sheriff’s office to provide law enforcement services as the designated LLEA.¹ See LBP-98-17, 48 NRC 69, 73-76 (1998).

In June 1999, PFS filed a motion seeking summary disposition of contentions Security-A and Security-B, and partial summary disposition regarding contention Security-C, based on information showing that, after the Board’s reconsideration ruling admitting these contentions, the Tooele County Board of Commissioners adopted a formal resolution approving the CLEA with the Skull Valley Band and the BIA as required under Utah law. The Board granted the PFS motion for summary disposition as it related to the issue of the legitimacy of the CLEA, leaving for litigation the initially-admitted contention Security-C issue of timely response to the PFS facility by the Tooele County sheriff’s office. See LBP-99-31, 50 NRC 147, 152-53 (1999). Thereafter, in a February 14, 2000 filing, the State advised the Board that it no longer wished to proceed to hearing on the timely response issue portion of contention Security-C, and the Board subsequently dismissed this contention. See LBP-00-5, 51 NRC 64, 67-69 (2000).

As was described above, the PSP-related contention now before us, which the State labels Security-J, Law Enforcement, was submitted on April 13, 2001. See [State] Request for

¹ Subsequently, the State filed a motion for admission of a late-filed amendment of these security contentions to include a claim that the CLEA was invalid because the Tooele County Attorney had opined that Tooele County was not obligated to provide law enforcement assistance at the PFS facility under the CLEA. The Board, however, rejected the State’s request as failing to merit admission under a balancing of the five late-filing factors set forth in 10 C.F.R. § 2.714 (a)(1). See LBP-99-7, 49 NRC 124, 128-29 (1999).

Admission of Late-Filed Contention Utah Security-J (Apr. 13, 2001) [hereinafter State Request].

With this contention, the State seeks to reintroduce the issue of the alleged lack of a valid LLEA assistance agreement. Newly proffered contention Security-J states:

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.

State Request at 4. In addition to its claims that this contention satisfies the five late-filing criteria found in 10 C.F.R. § 2.714(a)(1), the State declares that the basis for this contention is Senate Bill 81 (SB 81), entitled "Provisions Relating to High-Level Nuclear Waste," which the Governor of Utah signed into law on March 15, 2001. See State Request at 6; (citing id. exh. 2 (SB 81 excerpts revising Utah Code Ann. §§ 17-27-102, 17-34-1, 19-3-301, 19-3-303 (2001))). According to the State, among other things, the language in this legislation prevents local officials from entering into a contract or agreement to provide "municipal-type services," which apparently would include law enforcement assistance in the event of unauthorized penetration of the PFS facility. See Utah Code Ann. §§ 17-27-102(2), 17-34-1(1)(c), 17-34-1(3), 19-3-303(6). As a consequence, the State declares, the Tooele County CLEA provision to provide law enforcement services to the PFS facility is now void as against public policy in Utah, meaning PFS cannot rely upon that agreement to demonstrate its compliance with the Part 73 requirements requiring a designated LLEA or other response force. See State Request at 7-8.

In its response to the State's late-admission request, in addition to asserting that the contention does not merit admission under a balancing of the section 2.714(a) late-filing factors, see [PFS] Response to [State] Request for Admission of Late-Filed Contention Utah Security-J -- Law Enforcement (Apr. 27, 2001) at 8-12 [hereinafter PFS Response], PFS makes several

arguments as to why contention Security-J should not be accepted into this proceeding. Initially, it declares the contention should be rejected as a policy matter because the State's motion is a disingenuous attack on the Commission's licensing procedures that seeks to undermine the existing federal regulatory process. PFS further asserts that, as a matter of law, the contention is immaterial to the proceeding, and hence should not be admitted by the Board, because various issues regarding the constitutionality of the Utah law at issue here, including the LLEA assistance prohibition provisions relied upon by the State to support contention Security-J, as well as other recent state enactments will be resolved in a pending case, Skull Valley Band of Goshute Indians v. Leavitt, Case No. 2:01CV00270C (D. Utah. filed Apr. 19, 2001), recently filed by the Skull Valley Band and PFS in the United States District Court for the District of Utah.² In this regard, PFS argues that whatever ruling the federal district court

² In addition to SB 81, in their district court litigation PFS and the Skull Valley Band challenge five other pieces of Utah legislation, including Senate Bill 196 (SB 196), the High Level Nuclear Waste Disposal Act, enacted in 1998, see Utah Code Ann. §§ 19-3-302 to 19-3-317, which places various restrictions on the transportation and storage of nuclear waste in Utah. According to the PFS/Skull Valley Band complaint, the statute requires the Governor's approval for the transfer of spent nuclear fuel (SNF) in Utah; declares the transfer of SNF in Utah to be an ultra-hazardous activity (subjecting the transporter to strict liability); and requires State licensing for SNF storage or transfer. In addition, SB 196 requires an ISFSI applicant to post a two billion dollar cash bond to receive a state license; subjects all individuals participating in the project to unlimited strict liability; and requires the ISFSI applicant to pay a five million dollar fee over and above the actual cost for considering the application. See PFS Response, exh. 1, at 17 (Complaint in Skull Valley Band of Goshute Indians v. Leavitt, Case No. 2:01CV00270C (D. Utah. filed Apr. 19, 2001) [hereinafter Complaint]. Also, as described in that complaint, provisions of another of these Utah enactments, Senate Bill 177, the High Level Nuclear Waste Act, see Utah Code Ann. §§ 19-3-315, 19-3-318, 54-4-15, 78-34-6 (1999), purport to subject each utility and every shareholder of every utility affiliated with the PFS application to joint and several and strict liability for any mishaps that might occur, as well as require State approval before SNF shipments can be made, impose shipment fees, and prohibit the grant of easements to cross lands within the State for SNF transportation. See Complaint at 19-20.

Additionally, at issue in the pending federal district court lawsuit are laws passed by the Utah legislature that PFS and the Skull Valley Band assert restrict road and rail travel relating to the PFS operation. Among these is (1) a 1998 enactment, Senate Bill 78, Master Road -- State
(continued...)

makes regarding the constitutionality of these Utah laws will effectively moot the matter before the Licensing Board. According to PFS, a finding that the Utah statute's LLEA assistance prohibition provision is unconstitutional will mean PFS has complied with NRC physical security regulations so that construction and operation can proceed as planned. If, on the other hand, the federal district court upholds the Utah law, then for all intents and purposes PFS facility operation will be foreclosed because PFS cannot continue to build the facility in light of the impediments put in place by this enactment. See PFS Response at 3-5.

For its part, the staff argues that a balancing of the section 2.714(a)(1) late-filing factors weighs in favor of admitting contention Security-J and that the State has provided a sufficient basis for the contention. The staff thus declares that it does not oppose admission of this contention into the proceeding, at least in the absence of a federal court determination that the laws in question are not federally preempted or otherwise unconstitutional. See [Staff] Response to [State] Request for Admission of Late-Filed Contention Utah Security-J (Apr. 27, 2001) at 4-9 [hereinafter Staff Response].

²(...continued)

Highway List, see Utah Code Ann. §§ 72-4-106, 72-4-119, 72-4-122, 72-4-125, 72-4-135, which the PFS/Skull Valley Band complaint indicates removes control of State Road 196, the only road with access to the Skull Valley Band reservation, from Tooele County and places it with the State; and (2) the 1999 legislation, Senate Bill 164, State Roads Designated, see Utah Code Ann. § 72-3-301, which PFS and the Skull Valley Band assert empowers the State to control gravel and dirt roads near the Skull Valley Band reservation, thus enabling the State to deny all rail or truck access to the reservation. See Complaint at 16-17, 18. Furthermore, according to the PFS/Skull Valley Band complaint, under Senate Bill 66, Statewide Highway Criteria, see Utah Code Ann. §§ 72-1-303, 72-4-102, 72-7-513, also enacted in 1999, the State may designate rural roads as state highways if it determines that there is a public safety interest. See Complaint at 19.

II. ANALYSIS

To justify a presiding officer's consideration of the "merits" of a late-filed contention, i.e., whether the contention fulfills the admissibility standards articulated in the Commission's rules of practice, a party first must demonstrate that a balancing of the five factors set forth in section 2.714(a)(1)(i)-(v) of 10 C.F.R. Part 2 supports accepting the petition. And in that regard, it is well-established that (1) the first and foremost factor is whether good cause exists that will excuse the late-filing of the contention; and (2) lacking good cause, a balancing of the other four factors -- in which factors three (assistance in developing a sound record) and five (broadening the issues/delaying the proceeding) are given more weight than factors two (availability of other means to protect the petitioner's interests) and four (extent of representation of those interests by other parties) -- must provide a compelling showing in favor of admission. See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244-45 (1986).

In this instance, weighing these factors could well lead to a determination that admission of contention Security-J is warranted. Although PFS argues in connection with factor one that "[t]he State should not be permitted to use its sovereign powers to artificially create 'good cause' for late-filed contentions" and that the Board "should summarily reject the State's use of its sovereign power to orchestrate a perversion of the Commission's licensing process as 'good cause,'" PFS Response at 9, the State and the staff seem to have the better argument in their assertion that the new legislation afforded an appropriate trigger for contention Security-J and that the State fulfilled the good cause requirement by filing its contention within thirty days after passage of the legislation. See State Request at 8-9; Staff Response at 4. The same is true with regard to the State's and the staff's overall assessments that, when balanced, the other

four factors weigh in favor of admission as well.³ See State Request at 1; Staff Response at 4-5. Moreover, as the State and staff contend, in its reliance upon the recently-enacted legislation, the State does appear to have provided an admissible basis for the contention. See State Request at 6-8; Staff Response at 6-9.

This being said, we nevertheless decline to rule on the admissibility of this contention at this time. Our determination in this regard reflects our concern about ensuring the efficient use of Board and party resources in this proceeding. From the case complaint attached as exhibit one to the PFS response, it is clear that the legal issue of the validity of the March 2001 Utah legislation (including the LLEA assistance agreement prohibition provision that is the focus of contention Security-J) relative to the Constitution's Supremacy, Commerce and Contracts Clauses, among others, will be a central issue before the federal district court. It is equally clear, however, that this legal issue will be the central -- and likely dispositive -- matter before the Board in any litigation regarding contention Security-J.⁴ At this juncture, it seems an

³ With regard to the other four section 2.714(a)(1) late-filing elements, the State takes the position that factors two, three, four, and five favor; PFS asserts that all four factors do not support admission; and the staff declares that factors three and four favor admission, while factors two and five do not, but concludes that a balance of these four, in conjunction with the State's showing regarding factor one, supports admission. See State Request at 9-10; PFS Response at 9-12; Staff Response at 4-5. We consider somewhat problematic the PFS and staff arguments regarding factor two as an element weighing against admissibility given that the identified "other means" available to protect the State's interest, i.e., the federal district court proceeding, is one the State did not invoke and in which it has no choice but to participate.

⁴ The staff has suggested that, even if the constitutionality of the March 2001 Utah statute's LLEA assistance agreement prohibition provision is upheld, there are other avenues by which PFS might be able to fulfill the requirements of Part 73, including the designation of another "response force" or the invocation of the Commission-recognized "realism" doctrine whereby the best efforts of state and local government officials in an emergency situation are assumed. See Staff Response at 9-10 (citing 10 C.F.R. § 50.47(c)(1)(iii)); see also PFS Response at 6-8 (arguing realism doctrine supports rejection of contention Security-J as immaterial). PFS has made it clear, however, that it considers the various legislative restrictions imposed by the State of Utah, including the bar to LLEA assistance agreements at issue here, to be so severe and pervasive that PFS will be forced to abandon the project if this
(continued...)

injudicious use of the Board's and the parties' time and resources to engage in litigating an issue that is pending in, and could well be resolved by, a superior judicial forum.

We thus defer ruling on the admissibility of this contention pending further developments in the federal district court proceeding. We will, however, monitor this proceeding to determine whether there are any developments, such as Commission intervention or scheduling considerations, that would warrant further Board action on the contention pending a court ruling on the constitutionality of the Utah legislation. Moreover, during this deferral period, the Board requests that the parties to the federal district court litigation that are also before us, i.e., PFS, the Skull Valley Band, and the State, file periodic joint reports on the status of that lawsuit. The first of these reports should be filed on or before Friday, June 29, 2001, with additional reports to follow at forty-five-day intervals thereafter.

III. CONCLUSION

Although the State's late-filed contention Security-J may well meet the standards for admissibility under 10 C.F.R. § 2.714, the Licensing Board will defer ruling on the admission of this contention given that the central legal issue that would be before the Board -- the constitutionality of the LLEA assistance agreements prohibition provision of recently-enacted

⁴(...continued)
legislation is not struck down as unconstitutional. See PFS Response at 5.

Utah Senate Bill 81 -- also is a central legal issue in pending federal district court litigation to which PFS, the Skull Valley Band, and the State are all parties.

For the foregoing reasons, it is this fourteenth day of June 2001, ORDERED, that:

1. A Board ruling on the April 13, 2001 State request for admission of late-filed contention Security-J, Law Enforcement, is deferred pending further order of the Board.
2. PFS, the Skull Valley Band, and the State shall file joint reports regarding the status of the pending federal district court litigation, Skull Valley Band of Goshute Indians v. Leavitt,

Case No. 2:01CV00270C (D. Utah filed Apr. 19, 2001), in accordance with the schedule established in section II above.

THE ATOMIC SAFETY
AND LICENSING BOARD⁵

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Dr. Jerry Kline
ADMINISTRATIVE JUDGE

/RA/

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

June 14, 2001

⁵ 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, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DEFERRING ADMISSIBILITY RULING ON LATE-FILED CONTENTION SECURITY-J) (LBP-01-20) 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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Docket No. 72-22-ISFSI
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CONTENTION SECURITY-J) (LBP-01-20)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of June 2001