

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

July 24, 2001

MEMORANDUM AND ORDER
(Status of "Confidential" Documents)

In a June 28, 2001 responsive pleading, intervenor Ohngo Gaudadeh Devia (OGD) has opposed the pending May 25, 2001 motion for summary disposition of contention OGD O, Environmental Justice Issues are Not Addressed, filed by applicant Private Fuel Storage, L.L.C. (PFS). Accompanying the OGD responsive pleading is a three-page letter from OGD counsel addressed to the Board members in which, among other things, OGD indicates that it is tendering the declaration of Mr. Sammy Blackbear and supporting exhibits "under an expectation of confidentiality, especially with respect to the Exhibits" and that the exhibits "are not being served other than on the judges (and only by mail), subject to claims of confidentiality, safety and sovereignty." June 28, 2001 Letter to Licensing Board from Samuel E. Shepley, OGD Counsel, at 2. The letter goes on to provide a four-paragraph explanation as to why the exhibits in question should be afforded confidential treatment. It concludes by declaring that "[s]hould other parties to these proceedings argue that they must be allowed to view these Exhibits, OGD and Mr. Blackbear are prepared to assist the Board in developing appropriate safeguards." Id. at 3. Further, the certificates of service that accompany the OGD responsive

pleading declares that the cover letter, the responsive pleading, and all the documents accompanying the responsive pleadings, other than the exhibits in question, were served on all the parties to the proceeding, the Licensing Board, and the NRC Office of the Secretary.

Upon receipt in the Office of the Secretary, the cover letter, the pleadings, and the accompanying documents -- including Mr. Blackbear's declaration -- were made part of the public record of this proceeding and placed in the agency's ADAMS public document system, effective July 11, 2001. The exhibits supporting Mr. Blackbear's declaration, which were served only on the Board as indicated in the June 28, 2001 OGD cover letter, have not been incorporated into the agency docket or the public document system.

The Board also is in receipt of a July 19, 2001 letter from PFS to OGD in which PFS indicates that, notwithstanding the OGD certificates of service, PFS did not receive the June 28, 2001 OGD letter. As a consequence, PFS asserts that in providing the letter and exhibits to the Board without service on other parties, OGD has created a violation of 10 C.F.R. § 2.780, the agency regulation governing ex parte communications, that requires corrective action.

Given the seeming contradiction between the OGD certificate of service and the PFS letter relative to the July 28, 2001 OGD cover letter, as well the apparent failure of OGD counsel to serve the supporting exhibits upon the Office of the Secretary in accordance with 10 C.F.R. § 2.701, acting at the direction of the Licensing Board Chairman, on July 20, 2001, an Atomic Safety and Licensing Board Panel staff member attempted to contact OGD counsel by telephone to ascertain the status of service of the cover letter and the exhibits. On July 23, 2001, OGD counsel returned this call and advised that, to the best of his knowledge, the cover letter had been served on PFS, but was being re-served. He further indicated that the "confidential" exhibits had not been provided to the Office of the Secretary. Additionally, OGD counsel declared that the June 28, 2001 OGD cover letter was a request that both Mr.

Blackbear's declaration and the accompanying exhibits be treated as confidential, nonpublic information. Finally, OGD counsel stated that he did not want to make further representations on behalf OGD regarding these documents or other matters because he would be withdrawing as OGD counsel shortly and that new counsel for OGD would be entering an appearance thereafter.

This situation presents several issues. First, with regard to the matter of PFS receipt of the June 28, 2001 cover letter, we expect that current OGD counsel will follow through promptly on his commitment to re-serve the letter on PFS. Once it is received, it seems apparent from the July 19, 2001 PFS letter that PFS will seek disclosure of the exhibits provided only to the Board. Given the OGD recognition in its cover letter that it stands ready to assist the Board in finding appropriate safeguards for these documents, we expect that in the first instance OGD (whether through existing counsel that filed the response or OGD's new counsel) will contact counsel for the interested parties (e.g., PFS, the NRC staff) and attempt to arrive at some accommodation on a protective order, as has been done in other instances in this proceeding relative to proprietary and safeguards information. Accordingly, on or before Friday, August 3, 2001, OGD counsel should either provide the Board with a report that outlines the status of ongoing discussions among the parties regarding a protective order or, if no such agreement can be reached, file a motion for protective order, with pertinent supporting affidavits, outlining the reasons why the exhibits in question should not be made part of the public record of this proceeding.¹ See 10 C.F.R. § 2.790(b).

¹ With regard to this filing deadline, relative to an OGD counsel change less than six months ago during which the Board was apprized that an additional counsel change might be necessary, the Board advised OGD that "any delay OGD might assert is attributable to an additional counsel change will be closely scrutinized by the Board." Licensing Board Memorandum and Order (Granting Motion to Compel Response Extension Motion) (Apr. 17, 2001) at 4 (unpublished).

The next question concerns the status of the exhibits vis a vis the agency's adjudicatory docket. As the agency's rules of practice make clear, the Secretary -- not the Licensing Board -- maintains the docket for this and other agency adjudicatory proceedings and, absent a specific Board directive to the contrary, all pleadings and other adjudicatory materials provided to the Board must be sent to the Secretary for entry in the official docket. See 10 C.F.R. §§ 2.701, 2.702. The fact a party seeks to designate certain material as nonpublic does not change that requirement for, as this case illustrates, an adjudicatory proceeding docket may include both public and nonpublic information. Thus, to conform to the requirements of section 2.708(d), OGD should provide an original and two copies of the exhibit materials (which are listed in the index to Mr. Blackbear's declaration alphabetically, but are marked numerically) to the Office of the Secretary by means that will ensure receipt by Monday, July 30, 2001. The exhibits should be accompanied by a transmittal letter or memorandum, which should be served on all other parties, the Board, and the Secretary.

Finally, there is the matter of the status of Mr. Blackbear's declaration, which is currently a part of the public record of this proceeding. Given OGD's present position (as expressed to the Licensing Board's staff) regarding the confidential status of this document, the question is whether the Board should attempt to undo what has been done, i.e., to now provide this document with confidential, nonpublic treatment. Under the circumstances here, we see no reason to do so.

The treatment OGD counsel afforded Mr. Blackbear's declaration belies the supposed sensitive nature of the information it contains. Putting aside the fact that Mr. Blackbear's declaration contains no markings indicating that it should be afforded confidential treatment, the cover letter that accompanies the OGD response, while mentioning an "expectation of confidentiality," only sets forth reasons for treating the supporting exhibits as confidential

without mentioning any rationale that supports confidentiality for the declaration itself. Moreover, despite the expressed concern in OGD's cover letter about disclosure of the exhibit information to Chairman Leon Bear of the Skull Valley Band Goshute Indians and its recitation that PFS previously has informed OGD counsel PFS will not withhold from Mr. Bear information it receives, OGD apparently neither attempted to reach an agreement with PFS or the other parties to afford any kind of protection to the document nor made a formal request for the entry of a Board protective order affording it such treatment prior to serving Mr. Blackbear's declaration on all parties to this proceeding, including PFS.

The actions of OGD in presenting this declaration thus could be considered as effectively constituting a waiver of any claim to confidentiality for this document. Be that as it may, an even more telling deficiency is the apparent lack of any substantive basis for affording such treatment to the declaration. The affidavit sets forth a series of charges regarding the actions of Mr. Leon Bear and others relative to the governance of the Skull Valley Band, including the circumstances surrounding the Band's lease agreement with PFS for its proposed independent spent fuel storage installation, many of which have already been put before the Board as part of the public record of this proceeding. See Licensing Board Memorandum and Order (Ruling on Discovery Motions and Request to Extend Time to Complete Depositions) (May 29, 2001) at 4 (unpublished). Putting aside the merits of the PFS position, as expressed in its dispositive motion, that such subjects are irrelevant to the matters at issue relative to contention OGD O, we find nothing in the declaration that would support providing its contents confidential treatment as privileged or otherwise protected information. Accordingly, at this

juncture, having no basis to treat Mr. Blackbear's affidavit in any other manner, we will permit it to remain on the public record of this proceeding.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD²

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

July 24, 2001

² 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 of Utah; 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 (STATUS OF "CONFIDENTIAL" DOCUMENTS) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
G. Paul Bollwerk, III, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Jerry R. Kline
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Peter S. Lam
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Sherwin E. Turk, Esquire
Catherine L. Marco, Esquire
Office of the General Counsel
Mail Stop - 0-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Diane Curran, Esquire
Harmon, Curran, Spielberg
& Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036

Joro Walker, Esquire
Director, Utah Office
Land and Water Fund of the Rockies
1473 South 1100 East, Suite F
Salt Lake City, UT 84105

Martin S. Kaufman, Esquire
Atlantic Legal Foundation
205 E. 42nd St.
New York, NY 10017

Docket No. 72-22-ISFSI
 LB MEMORANDUM AND ORDER (STATUS
 OF "CONFIDENTIAL" DOCUMENTS)

Denise Chancellor, Esquire
 Assistant Attorney General
 Utah Attorney General's Office
 160 East 300 South, 5th Floor
 P.O. Box 140873
 Salt Lake City, UT 84114

Jay E. Silberg, Esquire
 D. Sean Barnett, Esquire
 Shaw Pittman
 2300 N Street, NW
 Washington, DC 20037-1128

John Paul Kennedy, Sr., Esquire
 David W. Tufts, Esquire
 Confederated Tribes of the Goshute
 Reservation and David Pete
 Durham Jones & Pinegar
 111 East Broadway, Suite 900
 Salt Lake City, UT 84105

Richard Wilson
 Department of Physics
 Harvard University
 Cambridge, MA 02138

Richard E. Condit, Esquire
 Land and Water Fund of the Rockies
 2260 Baseline Road, Suite 200
 Boulder, CO 80302

Danny Quintana, Esquire
 Skull Valley Band of Goshute Indians
 Danny Quintana & Associates, P.C.
 68 South Main Street, Suite 600
 Salt Lake City, UT 84101

Samuel E. Shepley, Esquire
 Steadman & Shepley, LC
 550 South 300 West
 Payson, UT 84651-2808

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
 this 24th day of July 2001