

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

April 7, 2004

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

April 13, 2004 (10:38AM)

In the Matter of)

PRIVATE FUEL STORAGE L.L.C.)

(Private Fuel Storage Facility))

Docket No. 72-22

ASLBP No. 97-732-02-ISFSI

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**APPLICANT'S MOTION FOR RECONSIDERATION OF THE MARCH 31, 2004
MEMORANDUM AND ORDER REGARDING PUBLIC DISCLOSURE OF CROSS-
EXAMINATION PLANS FOR CONTENTIONS UTAH E, UTAH R, AND UTAH S**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS"), respectfully requests reconsideration of the Memorandum and Order (Forwarding Cross-Examination Plans) (March 31, 2004) ("Order") by which the Atomic Safety and Licensing Board ("Board") forwarded for publication the cross-examination plans of PFS, the State of Utah ("State"), and the NRC Staff regarding contentions Utah E/Confederated Tribes F, "Financial Assurance," Contention Utah R, "Emergency Plan," and Contention Utah S, "Decommissioning." In its Order, the Board stated that none of the cross-examination plans are deemed to contained proprietary information. However, some of the State's cross-examination plans, not previously available to PFS, do contain information which the Board has found proprietary to PFS in similar circumstances. PFS respectfully requests that this proprietary information be redacted from the State's cross-examination plans prior to their release to the public.

Discussion

A motion for reconsideration is appropriate where a presiding officer's determination overlooked or misapprehended (1) some legal principle or decision that should have controlling

effect; or (2) some critical factual information. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-31, 52 NRC 340, 342 (2000) (internal citations omitted) (quoting Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73-74 (1998)). PFS shows below that the Board was unaware of critical factual information regarding the presence of confidential proprietary information in the State's cross-examination plans at the time of the March 31, 2004 Order. Thus, the Board should reconsider its decision.

On March 31, 2004, the Board forwarded to the Secretary of the Commission for inclusion in the public record the cross-examination plans of PFS, the State, and the NRC Staff for Contention Utah E/Confederated Tribes F, "Financial Assurance," Contention Utah R, "Emergency Plan," and Contention Utah S, "Decommissioning" pursuant to 10 C.F.R. § 2.743(b)(2). Citing a joint filing of the parties,¹ the Board stated that "none of [the plans] are deemed to contain proprietary information." (Order at 1). Following issuance of the Board's Order, however, PFS identified that several of the State's cross-examination plans for Contention Utah E/Confederated Tribes F, "Financial Assurance," ("Utah E") do contain information proprietary to PFS.² This Motion for Reconsideration requests that this proprietary information be redacted from the State's Utah E cross-examination plans prior to their release to the public.³

¹ Joint Filing of the Parties on Portions of Memorandum and Order (Rulings on Summary Disposition Motion and Other Filings Related to Remand from CLI-00-13), Partial Initial Decision (Contention Utah E/Confederated Tribes F), Partial Initial Decision (Contention Utah S), and Cross-Examination Plans Regarding Contention Utah E That Can Be Placed on the Public Record (July 3, 2003) ("Joint Filing").

² Although the Board may have believed that the parties had exchanged their cross-examination plans prior to the July 3, 2003 Joint Filing, in fact they did not do so. Thus, PFS had not seen or reviewed the State's cross-examination plans before the Board's March 31, 2004 Order.

³ Following identification, PFS called the Secretary's Office and was advised that the documents had not been placed into ADAMS, and that an e-mail would be sent requesting return of the cross-examination plans from those parties not authorized to receive PFS confidential proprietary information. See electronic mail from Emile L. Julian, Office of the Secretary (April 1, 2004). PFS does not believe that any inadvertent disclosure that may have occurred as a result of the Secretary's service of the Order and the plans would constitute a waiver by PFS of its proprietary information.

The proprietary information contained in the State's cross-examination plans for Utah E consists of four types: (1) the amount of nuclear property insurance that PFS intends to carry; (2) the minimum initial-sized facility to be funded for construction under License Condition 1; (3) the total estimated cost for Phase I construction; and (4) construction cost estimates for specific items. This proprietary information is contained in three State cross-examination plans for Utah E: (1) PFS Witness John Parkyn on Nuclear Property Insurance; (2) PFS Witness John Parkyn on PFS Construction Costs; and (3) PFS Expert Witness Hanson Pickerl on Nuclear Property Insurance. The specific redactions sought by PFS in each cross-examination plan are listed in Appendices A, B, and C to this motion.⁴

The identified information is protected from public disclosure by the Commission's rules. In another March 31, 2004 ruling,⁵ the Board found that "the amount of onsite property insurance PFS intends to maintain qualif[ies] as confidential financial or commercial information under 10 C.F.R. § 2.790(b)(3)(i)." Disclosure/Redaction Order at 32. The Board also found "that disclosure of the minimum sized facility for purposes of satisfying [License Condition 1] would lead to substantial competitive harm" and concluded that this "information is subject to protection as confidential or privileged commercial or financial information under the first prong of 10 C.F.R. § 2.790(b)(3)." *Id.* at 17. Finally, the Board found that "information relative to the bottom line construction costs is confidential or privileged commercial or financial information

⁴ PFS incorporates and relies upon the previously submitted affidavits and declarations of John Parkyn pursuant to 10 C.F.R. § 2.790 to support its requested redaction of the State's cross examination plans. *See* Affidavit of John Parkyn Pursuant to 10 C.F.R. § 2.790 (May 15, 2000); Declaration of John Parkyn Pursuant to 10 C.F.R. § 2.790 (September 25, 2000); Declaration of John D. Parkyn Pursuant to 10 C.F.R. § 2.790 (September 28, 2000); Declaration of John D. Parkyn Pursuant to 10 C.F.R. § 2.790 (December 4, 2000); Declaration of John Parkyn Pursuant to 10 C.F.R. § 2.790 (July 2, 2003).

⁵ Memorandum and Order (Disclosure/Redaction of Evidentiary and Decisional Materials Relating to Contentions Utah E/Confederated Tribes F and Utah S; Adopting Transcript Corrections Relating to Contentions Utah E/Confederated Tribes F and Utah S) (March 31, 2004) ("Disclosure/Redaction Order").

under the first prong of 10 C.F.R. § 2.790(b)(3).” *Id.* at 18. Thus, the Board has already determined that the information PFS seeks to redact from the State’s Utah E cross-examination plans is protected from public disclosure.

PFS does not object to the publication of the remaining portions of the State’s cross-examination plans nor to the publication of the NRC Staff’s cross examination plans.⁶

Statement of NRC Staff’s and State of Utah’s Positions on Motion

Counsel for PFS has discussed the proposed redactions in Appendices A, B, and C with counsel for the State and the NRC Staff and is authorized to represent as follows.⁷

The Staff does not object to the redactions proposed by PFS to the State’s cross examination plans for Utah E set forth in Appendices A, B, and C.

As reflected in the Appendices, the State does object to the redactions sought by PFS and requests that the State’s cross examination plans be released in their entirety. For reasons set forth in its September 15, 2000⁸ and October 11, 2000,⁹ filings, the State believes that the information in the evidentiary record concerning the (1) the amount of nuclear property insurance that PFS intends to carry; (2) the minimum initial-sized facility to be funded for construction under License Condition 1; and (3) the total estimated cost for Phase I construction should be released and made available to the public.¹⁰ Moreover, says the State, any

⁶ As previously stated in the Joint Filing at 2, PFS does not object to the public release of its cross-examination plans.

⁷ Neither the Staff nor the State request any redaction of the cross examination plans on their own accord.

⁸ State of Utah’s Request to Disclose Evidentiary Material Relating to the Hearing on Contention Utah E/Confederated Tribes F and Request to Reply (September 15, 2000).

⁹ State of Utah’s Reply to Applicant’s Response to State of Utah’s Request to Disclosure Evidentiary Material Relating to the Hearing on Contention Utah E/Confederated Tribes F (October 11, 2000).

¹⁰ See also, State of Utah’s Response to Applicant’s Justification for Withholding Portions of Memorandum and Order (Ruling on Summary Disposition Motion and Other Filings Relating to Remand From CLI-00-13), Partial Initial Decision (Contention Utah E/Confederated Tribes F), and Partial Initial Decision (Contention Utah S) From Public Disclosure (July 14, 2003); and State of Utah’s Objections to Applicant’s Proposed Redactions to Board Memorandum and Order Ruling on Reconsideration of its Financial Qualifications Decisions (January 30, 2004).

confidentiality claims may have been waived by the Secretary's public release (even though inadvertent) of the plans.¹¹ In any event, the State believes that the requested redactions from the cross-examination plans are obscure and their release will not result in any competitive harm to PFS.

Neither the Staff nor the State will be filing separate responses to this Motion for Reconsideration.¹²

Conclusion

For all the reasons discussed above, PFS requests the Board to reconsider its March 31, 2004, decision regarding the State's cross-examination plans for Utah E and to order redaction of the proprietary information identified herein by PFS before publication of the documents.

Respectfully submitted,



Jay E. Silberg
Paul A. Gaukler
D. Sean Barnett
SHAW PITTMAN, LLP
2300 N Street, N.W.
Washington, DC 20037
(202) 663-8000

Dated: April 7, 2003

Counsel for Private Fuel Storage L.L.C.

¹¹ See April 1, 2004 e-mail from NRC "hearing docket" to PFS service list (*supra*, note 3) requesting nine individuals who were served with the cross-examination plans (but who did not otherwise have access to this information) to return them.

¹² If the Board were to issue a ruling on this Motion by early next week, the parties would incorporate any request for review of the Board's Order in any petitions for review filed with respect to of the Board's Disclosure/Redaction Order.

Before the Atomic Safety and Licensing Board

ASLBP No. 97-732-02-ISFSI

***Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001**

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications
Staff

e-mail: hearingdocket@nrc.gov
(Original and two copies)

Catherine L. Marco, Esq.
Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: pfscase@nrc.gov

John Paul Kennedy, Sr., Esq.
David W. Tufts, Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84105
e-mail: dtufts@djplaw.com

Diane Curran, Esq.
Harmon, Curran, Spielberg &
Eisenberg, L.L.P.
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
e-mail: dcurran@harmoncurran.com

Paul EchoHawk, Esq.
Larry EchoHawk, Esq.
Mark EchoHawk, Esq.
EchoHawk PLLC
P.O. Box 6119
Pocatello, ID 83205-6119
e-mail: paul@echohawk.com

* By U.S. mail only

* Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancellor@utah.gov

Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East
Suite F
Salt Lake City, UT 84105
e-mail: lawfund@inconnect.com

Tim Vollmann, Esq.
Skull Valley Band of Goshute Indians
3301-R Coors Road, N.W.
Suite 302
Albuquerque, NM 87120
e-mail: tvollmann@hotmail.com



Paul A. Gaukler