

21324
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RECEIVED
LBP-00-05
USNRC

ATOMIC SAFETY AND LICENSING BOARD

'00 FEB 29 P1:46

Before Administrative Judges:

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

ORIGINAL FILED
ADJUDICATORY STAFF

SERVED FEB 29 2000

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
February 29, 2000

MEMORANDUM AND ORDER
(Dismissing Contention Security-C)

By filing dated February 14, 2000, intervenor State of Utah (State) advised the Licensing Board that it does not intend to proceed with further litigation on contention Security-C, Local Law Enforcement. In a February 22, 2000 telephone conference, applicant Private Fuel Storage, L.L.C., (PFS) and the NRC staff -- the other two parties involved in litigating issues regarding the adequacy of the physical security plan (PSP) for the PFS proposed 10 C.F.R. Part 72 Skull Valley Utah, independent spent fuel storage installation (ISFSI) -- requested that, in accordance with 10 C.F.R. § 2.707, contention Security-C be dismissed for want of prosecution.

DS02

We agree that this matter is no longer at issue. Accordingly, for the reasons set forth herein, we dismiss contention Security-C.

I. BACKGROUND

Contention Security-C was initially admitted as part of the Board's June 29, 1998 ruling on the State's nine PSP contentions, albeit limited to the issue of compliance with the requirements of 10 C.F.R. Part 73 regarding local law enforcement agency (LLEA) timely response to incidents at the proposed Skull Valley ISFSI. In so ruling, we also rejected a portion of the contention that sought to question whether PFS had complied with the requirement of 10 C.F.R. § 73.51(d)(6) to have a "documented liaison" with an LLEA, in this instance the Tooele County, Utah sheriff's office. We did so on the basis of a cooperative law enforcement agreement (CLEA) that had been shown to exist between the Skull Valley Band of Goshute Indians (Skull Valley Band), on whose reservation the proposed PFS facility is to reside, the United States Department of the Interior's Bureau of Indian Affairs, and Tooele County that provided the LLEA with law enforcement jurisdiction on the Skull Valley Band reservation. See LBP-98-13, 47 NRC 360, 369-70 (1998). Subsequently, in ruling on a State motion for reconsideration, we admitted this portion of the contention

(as well as portions of two other previously dismissed issue statements) to address the question whether the existing CLEA had been properly adopted by the Tooele County Commission. See LBP-98-17, 48 NRC 69, 75-76 (1998). The State then sought to have the admitted contention amended to incorporate a further challenge to the validity of the CLEA based on statements of the Tooele County Attorney declaring his belief that the CLEA did not require the county to provide law enforcement services to PFS, a request we rejected as failing to meet the late-filing standards of 10 C.F.R. § 2.714(a)(1). See LBP-99-7, 49 NRC 124, 128-29 (1999). Ultimately, the CLEA adequacy portion of the contention was resolved in our August 1999 decision granting a PFS motion for summary disposition, which was based on the unrebutted PFS showing that the Tooele County Commission had acted to ratify the CLEA in accordance with Utah state law. See LBP-99-31, 50 NRC 147, 152-53 (1999). This ruling had the effect of returning contention Security-C to its originally admitted scope.

In a November 15, 1999 order, we scheduled an evidentiary hearing on contention Security-C for March 14-15, 2000, with prefiled testimony to be submitted on February 29, 2000. See Licensing Board Order (Schedule for Evidentiary Hearing Regarding Contention Security-C) (Nov. 15, 1999) at 2 (unpublished). In a February 14, 2000

pleading, the State indicated it has decided not to litigate contention Security-C further. Noting the history of this contention as set forth above and reiterating its belief there is no current contractual agreement in place with the Tooele County sheriff's office that confers jurisdiction on the county for PFS-related law enforcement activities, the State explains it is declining to participate further in that "its real safety concerns will not be heard in the March hearing because of the narrow confines of Utah Security-C." [State] Notification of Its Decision Not to Go Forward with Utah Security-C (Feb. 14, 2000) at 4 [hereinafter State Notification]. Thereafter, by a February 17, 2000 issuance, we advised the parties that a February 22, 2000 telephone prehearing conference previously scheduled to discuss administrative matters relating to the planned March 2000 hearing would be held to discuss instead the State's February 14, 2000 filing, including the applicability (if any) of 10 C.F.R. § 2.707, the provision of the agency's rules of practice governing participant defaults. See Licensing Board Memorandum and Order (Schedule for Prehearing Conference) (Feb. 17, 2000) at 1-2 (unpublished).

During the telephone conference, the State declared that it would stand on its February pleading. See Tr. at 1292. Both PFS and the staff requested that, in

accordance with section 2.707, contention Security-C should be dismissed as having been abandoned by the State.

Further, in response to Board questions, both parties indicated there were no significant safety issues relating to the contention that provided cause for additional, independent Board consideration of the matter. See id. at 1293-97. In response to these representations, the State demurred, stating that the Board "should do whatever you need to do." Id. at 1299.

II. ANALYSIS

As part of a presiding officer's duty to maintain order and to take appropriate action to avoid delay and regulate the course of a hearing and the conduct of the parties, a Board is expected to take action when parties, for whatever reason, fail to comply with scheduling and other orders. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982). The parameters of a Board's authority to act in such situations are outlined in 10 C.F.R. § 2.707, which provides in pertinent part that "[o]n failure of a party to file an answer or pleading within the time prescribed . . . [or] to appear at a hearing . . . the presiding officer may make such orders in regard to the failure as are just" (Footnote omitted.) Previously, this provision has been

invoked as the basis for dismissing a contention following a sponsoring party's failure to continue to prosecute the issue, including a failure to appear at a scheduled hearing. See Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit No. 2), LBP-76-7, 3 NRC 156, 157 (1976); see also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-90-12, 31 NRC 427, 429-31, aff'd in part, ALAB-934, 32 NRC 1 (1990); Consumers Power Co. (Palisades Nuclear Power Facility), LBP-82-101, 16 NRC 1594, 1595-96 (1982).

In this instance, the State has advised the Board of its unequivocal intent not to participate further in connection with contention Security-C.¹ See State Notification at 5; Tr. at 1298-99. This essentially places the State in default relative to the scheduled mid-March

¹ In so stating, however, the State also made it clear that it was not withdrawing the contention. See Tr. at 1298.

2000 hearing on this contention.² As a consequence, dismissal of its contention is appropriate at this juncture.

In taking this action, however, we note that in several of the cases in which parallel actions have been taken, there is the suggestion that the Board must undertake a review of the issue to ensure there are no serious matters that require consideration. See Pilgrim, LBP-76-7, 3 NRC at 157; see also Seabrook, LBP-90-12, 31 NRC at 431. Both the PFS and the staff make the point that this consideration must be tempered by the Commission's admonition, most recently reiterated in its 1998 policy statement on the conduct of adjudication, that a presiding officer should, on its own initiative, engage in the consideration of health, safety, environmental, or common defense and security matters outside the scope of admitted contentions only in "extraordinary circumstances" and then in accordance with

² As we observed during the February 22 prehearing conference, see Tr. at 1292, technically the State is not in default until the date for filing its prefiled testimony has passed. In this instance, however, having been advised by the State of its clear intent not to meet this schedule, we see no purpose would be served by delaying our dismissal action until sometime after that event.

In addition, as we indicated during the prehearing conference, see Tr. at 1293, the State's action in informing the Board and the other parties of its intent not to proceed well prior to the due date for submitting prefiled testimony, rather than simply failing to file on the required date, is a course that we commend. Its action evidences an appropriate concern for avoiding unnecessary resource expenditures by the Board and the other litigants.

the appropriate procedural dictates, which includes Commission referral of any decision to look into such matters. See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22-23 (1998). After again reviewing contention Security-C, as well as its basis relative to the admitted question of timely LLEA response capability and the information regarding this matter provided by the staff in its December 15, 1999 position statement, see NRC Staff's Statement of Its Position Concerning Group I-II Contentions (Dec. 15, 1999) attach. at 18, we are unable to find anything in question about this matter that reaches this level, making dismissal appropriate.³

III. CONCLUSION

In connection with contention Security-C, Local Law Enforcement, intervenor State of Utah has informed the Board that it no longer intends to pursue this issue as a matter for litigation in this proceeding. In accordance with its authority under 10 C.F.R. § 2.707, the Board finds that the State's decision to abandon its prosecution of this issue

³ Also regarding this matter, we note that although the State indicated its February 14, 2000 pleading might contain safeguards information and, appropriately, treated it as nonpublic information, we agree with the assessment of PFS and the staff that it, in fact, does not contain such information. See Tr. at 1291. Accordingly, we direct that it be made part of the public record of this proceeding.

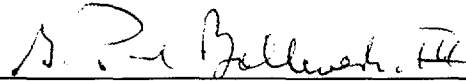
warrants dismissing contention Security-C from this proceeding. And with this ruling, all party issues regarding the adequacy of the proposed PFS facility PSP have been resolved.

For the foregoing reasons, it is this twenty-ninth day of February 2000, ORDERED, that

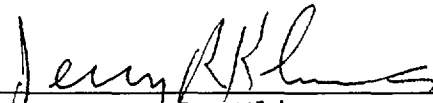
1. Contention Security-C is dismissed from this proceeding; and
2. The State's February 14, 2000 pleading entitled "State of Utah's Notification of Its Decision Not to Go

Forward with Utah Security-C" shall be placed into the public record of this proceeding.

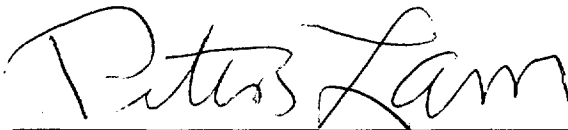
THE ATOMIC SAFETY
AND LICENSING BOARD⁴



G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE



Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE



Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

This memorandum and order is issued pursuant to the authority of the Atomic Safety and Licensing Board designated for this proceeding.

Rockville, Maryland

February 29, 2000

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, 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.)

(Independent Spent Fuel Storage)
Installation))

Docket No. 72-22-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DISMISSING CONTENTION SECURITY-C) (LBP-00-05) have been served upon the following persons by deposit in the U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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

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

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

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

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

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

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

Joro Walker, Esquire
Land and Water Fund of the Rockies
2056 East 3300 South, Suite 1
Salt Lake City, UT 84109

Docket No. 72-22-ISFSI
LB MEMORANDUM AND ORDER
(DISMISSING CONTENTION
SECURITY-C) (LBP-00-05)

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

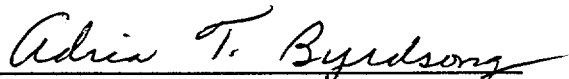
John Paul Kennedy, Esquire
Confederated Tribes of the Goshute
Reservation and David Pete
1385 Yale Avenue
Salt Lake City, UT 84105

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

Jay E. Silberg, Esquire
Shaw Pittman
2300 N Street, NW
Washington, DC 20037

Richard Wilson
Department of Physics
Harvard University
Cambridge, MA 02138

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


Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of February 2000