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January 28, 2000

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)

PRIVATE FUEL STORAGE L.L.C.)

(Private Fuel Storage Facility))

Docket No. 72-22

ASLBP No. 97-732-02-ISFSI

**APPLICANT'S RESPONSE TO STATE OF UTAH'S REQUEST FOR
RELEASE OF APPLICANT'S PROPRIETARY INFORMATION**

On January 10, 2000, the State of Utah filed "State of Utah's Reply to the Staff's Response to the Applicant's Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes Contention F" ("State's Reply"). In that reply pleading, the State explicitly asked the Board to release the proprietary financial and commercial information that PFS relied upon for its summary disposition motion.¹ Observing this request in a reply, the Board's Order of January 20, 2000 offered the other parties an opportunity to respond to the State's request.² Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby files this response opposing the State's request.

¹ See State's Reply at 20.

² See Memorandum and Order (Schedule for Responsive Filings Related to Dispositive Motion on Contention Utah E/Confederated Tribes F), dated January 20, 2000. See also Order (Granting Extension to File Responses Relating to Dispositive Motion on Contention Utah E/Confederated Tribes F), dated January 21, 2000.

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I. BACKGROUND

On December 3, 1999, PFS filed "Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes F" ("PFS's Motion"). In Contention Utah E, the State alleges that PFS has failed to demonstrate its financial qualifications. In order to respond to this contention, PFS included sensitive and confidential commercial and financial information in its motion -- including the proprietary LLC Agreement as Exhibit 2 to the Declaration of John Parkyn. PFS submitted its motion and the supporting Parkyn declaration and the proprietary LLC Agreement as proprietary documents, accompanied by an affidavit from John Parkyn requesting that the Commission maintain them as confidential under 10 C.F.R. § 2.790.³ PFS served the State with a copy of the proprietary submissions -- as it has throughout the course of these proceedings -- under the Confidentiality Agreement between PFS and the State.⁴ This agreement allows the State access to PFS confidential information for use in litigating the issues raised by the State in this proceeding subject to its terms and conditions.

On December 27, 1999, the State filed its response to PFS's summary disposition motion. On December 22, 1999, the Staff filed its response to PFS's motion⁵ to which the State filed a reply on January 10, 2000. In its January 10, 2000 reply to the Staff, the

³ See Affidavit of John D. Parkyn Pursuant to 10 C.F.R. § 2.790 Regarding Applicant's Motion for Partial Summary Disposition of Contention Utah E/Confederated Tribes F, dated December 2, 1999 (hereinafter "Parkyn's Affidavit").

⁴ "Confidentiality and Non-Disclosure Agreement" between PFS and the State of Utah, dated July 14, 1998.

⁵ See "Staff's Response to the Applicant's Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes Contention F," dated December 22, 1999.

State requests the Board "to release all information claimed to be proprietary [by PFS] in this summary disposition proceeding for public review and security." State's Reply at 20.

II. THE BOARD SHOULD NOT RELEASE PFS'S PROPRIETARY INFORMATION TO THE PUBLIC

The State's request to release PFS confidential financial and commercial information is without merit and should be denied. The State makes no claim, as it obviously could not given its access to the information under its confidentiality agreement with PFS, that it lacks access to such information to vigorously litigate the motion. Rather, it makes unsupported, amorphous public policy arguments and selectively quotes from 10 C.F.R. § 2.790(a) to justify its request.

The Commission has established clear guidelines for when proprietary information should be withheld from public disclosure. PFS has supplied the necessary support to establish that information in its motion is confidential "commercial or financial information" under the Commission's standards. Indeed, the State presents no argument that either the specific minimum initial capacity of the facility – the only specific piece of information referred to in its request -- or any other information for which it seeks release, is not proprietary or confidential under the Commission's regulations. Because the State has provided no valid reason for its disclosure to the public, the Board should not release PFS's proprietary information. Non-disclosure would be in accordance with well established NRC precedent. See, e.g., Metropolitan Edison Company (Three Mile Island Nuclear Station Unit No. 1), ALAB-807, 21 NRC 1195, 1214-15, n.106 (1985).

Specifically, the Board should deny the State's request because (1) the request is premature and (2) the State has failed to provide any valid legal or factual justification for release of the information.

A. The State's Request Is Premature and Should Be Denied

The Commission has long recognized that the public's right to licensing information must be balanced by the need to protect confidential or proprietary information. This principle, set forth in 10 C.F.R. § 2.790, is an entrenched part of the Commission's regulations. In § 2.790(a), the Commission established a general policy of public disclosure but also set forth specific classes of documents which are exempted from this general policy.⁶ Among the exemptions set forth in § 2.790(a) is the exemption for trade secrets and commercial or financial information. In relevant part, 10 C.F.R. § 2.790(a) states that:

... final NRC records and documents ... shall not, in the absence of a compelling reason for nondisclosure after a balancing of the interests of the person or agency urging nondisclosure and the public interest in disclosure, be exempt from disclosure, ... except for matters that are:

...

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

10 C.F.R. §2.790(a) (emphasis added).⁷

⁶ These exemptions mirror the exemptions set forth in the Freedom of Information Act. See 5 U.S.C. § 552.

⁷ The State in its selective quotation of 10 C.F.R. § 2,790(a) ignores the highlighted language providing for exceptions, including that for commercial and financial information. See State's Reply at 20 n.11

The standard for determining whether information submitted to the NRC falls within the “commercial or financial information” exemption of § 2.790(a)(4) is set forth in § 2.790(b)(4). The affidavit of John D. Parkyn, PFS Chairman, accompanying PFS’s motion, fully explains why the information submitted by PFS is commercial and financial information that should be withheld under the standards of 10 C.F.R. § 2.790(b)(4). Id. at ¶¶ 5, 6. The State advances no arguments for claiming that any specific piece of information in PFS’s motion does not meet the standards for “confidential or privileged commercial or financial information” set forth in 10 C.F.R. § 2.790(b)(4).

As such, the Board should deny the State’s request. It is well recognized under Commission law that disputes concerning public disclosure of proprietary information (where the parties to the proceeding have full access to the information) should be resolved after resolution on the merits, in order to avoid delay in a proceeding.

Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), ALAB-807, 21 NRC 1195, 1214-15 n.106 (citing 10 C.F.R. § 2.790(b)(6)(iii) and Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 (1982)). As stated by the Appeal Board in the Point Beach case:

The Commission’s rules contemplate a resolution of proprietary information disputes after the merits are resolved in order to avoid delay in proceedings.

16 NRC at 1261. Thus, the State’s request is premature given its full access to the proprietary and confidential information which it claims should be publicly released. The proceeding should be allowed to continue without delay caused by litigating such

ancillary issues. If at the end of the proceeding, the State still believes that all or additional or specific portions of proprietary information should be disclosed, it should renew its motion at that time.

B. The State Has Provided No Valid Justification For Its Request For The Disclosure Of PFS's Confidential Information

The State's request should also be rejected because it provides no valid justification for disclosure of PFS confidential information. In its motion, the State claims that "the public's interest in assuring compliance with regulatory requirements far outweighs any conceivable competitive disadvantage or other reason PFS may put forth for non-disclosure." State's Reply at 20. But the State provides no legal or factual basis to support this platitude. Instead, the State selectively quotes from 10 C.F.R. § 2.790(a) to justify its request, claiming that "under NRC regulations there must be a compelling reason for nondisclosure." *Id.* However, by ignoring the exemptions established in 10 C.F.R. § 2.790(a) (see note 7 *supra*), the State misapplies the Commission's regulations. The "compelling reason" test only applies to documents and records which are not excepted under the exemptions set forth in 10 C.F.R. § 2.790(a)(1)-(9). Because PFS seeks to protect commercial and financial information, the "compelling reason" standard is inapplicable. Thus, the State has provided no valid legal basis to justify its request.

Further, the State has failed to provide any factual basis to support its request. The only piece of information that it claims should be disclosed is the minimum planned initial capacity of the Private Fuel Storage Facility. In its motion, the State "strongly objects" to the withholding of the minimum planned initial capacity, arguing that

“public’s interest in assuring compliance with regulatory requirements far outweighs any favorable competition disadvantage.” State’s Reply at 20. The minimum planned initial capacity is the smallest sized facility that PFS has determined would be feasible to construct and thus its disclosure would provide important information to potential competitors that could be used to PFS’s competitive disadvantage. On the other side of the coin, the State advances no arguments on how the release of this information would assure regulatory compliance, which is the NRC’s role. In addition, the public’s rights will not be diminished by withholding the precise volume associated with the minimum planned initial capacity. It remains public knowledge that the maximum size of the facility will be 40,000 MTU. If PFS does decide to construct the facility at the minimum planned initial capacity, the only effect on the public is that the facility and any potential impacts would be smaller than expected. There will still be no public health and safety impact because the facility will be financially qualified at this minimum capacity by virtue of the financial commitments PFS has made.

Beyond its unfounded legal and factual arguments regarding the minimum sized facility, the State presents only the bald assertion that “all information” claimed to be proprietary in this summary disposition proceeding should be released to the public. State’s Reply at 20. The State provides absolutely no specific argument why proprietary and confidential information other than the minimum size facility contained in PFS’s summary disposition motion should be publicly disclosed.⁸

⁸ Other proprietary information in PFS’s submission includes the Limited Liability Company Agreement. The Agreement includes proprietary information addressing capital contribution and commitment requirements for LLC Members, existing LLC member interest acquisition and transfer, LLC asset

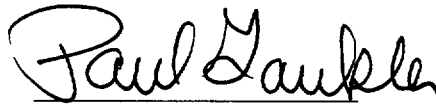
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Also, the withholding of this information from the public will not affect the ability of any party, including the State, to present its case. Under 10 C.F.R. § 2.790(b)(6), the Board has the authority to allow inspection of information withheld from public disclosure under a protective order between parties to the proceedings. This mechanism is not even necessary in the present situation because the State and PFS have signed a confidentiality agreement. Under this agreement, the State has access to all relevant, non-privileged information in PFS's possession, custody or control. The State can, and does, fully utilize the confidential documents it has received to fully participate in this proceeding.

III. CONCLUSION

For the foregoing reasons, the Board should reject the State's request for the public disclosure of PFS's confidential commercial and financial information.

Respectfully submitted,



Jay E. Silberg
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acquisition and transfer following dissolution, and restrictions on the LLC providing other services. This information is essential to the financial structure of the LLC and obligations of the LLC members. The financial structure and obligations of the equity members of the LLC is essential confidential information used to differentiate PFS from its potential competitors. If the nature and structure of the LLC and obligations required of LLC members were to fall into the hands of PFS's competitors, PFS would be at a serious competitive disadvantage in competing to obtain additional equity contributions and equity partners. Other proprietary information included in PFS's summary disposition motion includes the minimum projected revenue stream from which PFS's projected storage fees might be determined, as well as the amounts expected for each of the installment payments.

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Dated: January 28, 2000

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE
GENERAL COUNSEL
ADJUTANT GENERAL

Before the Atomic Safety and Licensing Board

In the Matter of)	
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PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22
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(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Response to State of Utah's Request for Release of Applicant's Proprietary Information" were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 28th day of January 2000.

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