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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '00 FEB 16 10:07

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	Docket No. 72-22-ISFSI
)	
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	February 4, 2000

**STATE OF UTAH'S MOTION TO COMPEL NRC STAFF TO RESPOND TO
STATE'S FOURTH SET OF DISCOVERY REQUESTS (CONTENTION E)**

Pursuant to 10 C.F.R. § 2.742, the State of Utah hereby moves the Board to compel the Staff to answer certain requests for admissions propounded in State of Utah's Fourth Set of Discovery Requests Directed to the NRC Staff (January 13, 2000) (hereafter "State's Discovery Requests"). This Motion to Compel relates to Utah Contention E (Financial Assurance) and is supported by the Declaration of Dr. Michael Sheehan,¹ attached hereto as Exhibit 1.

FACTUAL BACKGROUND

The State submitted its "Fourth Set of Discovery Requests Directed to the NRC Staff (Utah Contentions E)" on January 13, 2000. The State agreed to an extension of time for the Staff to respond and the Staff responded with "NRC Staff's Objections and Responses to 'State of Utah's Fourth Set of Discovery Requests Directed to the NRC

¹ Dr. Sheehan's curriculum vitae, publications and prior testimony were attached as Exhibit 2 to State's Objections and Response to Applicant's Second Set of Discovery Requests with respect to Groups II and III Contentions, submitted June 28, 1999.

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Staff (Utah Contention E)"" dated January 28, 2000 (hereafter "Staff's Discovery Response"). Attorneys for the State and the Staff were able to resolve some, but not all responses the State considered to be inadequate. The State sent the Staff a letter² on February 3, 2000, setting forth the basis for the State's concerns regarding the deficiency of the Staff's responses, a copy of which is attached hereto as Exhibit 2. The issues left unresolved relate to four general areas: (1) financial assurance for other ISFSIs licensed by the NRC (Request for Admission No. 16), (2) comparison between the proposed Louisiana Energy Service facility and the proposed PFS ISFSI (Requests for Admission Nos. 24-29); (3) PFS service agreements and funding (Requests for Admission Nos. 44, and 46); and (4) relationship among customers (Request for Admission No. 36). Prior to filing this Motion today, and since sending the letter to the Staff, the State and the Staff have been able to resolve disputes with respect to Requests for Admissions Nos. 35 and 45. The Staff may be able to provide an answer to Request for Admission No. 16 but Staff will not be in a position to respond until Monday or later; therefore, No. 16 is still included in the State's Motion to Compel. Please refer to the State's February 3, 2000 letter to the Staff, Exhibit 2, which sets out the deficiencies in the Staff's responses.

ARGUMENT

I. The Standard for Discovery Against the Staff for Requests for Admissions Is on the Same Footing as For Any Other Party and Is One of Broad Relevance.

² In the State's letter to the Staff, the State incorrectly referred to the Staff's responses to the Fifth Set of discovery, rather than its responses to the Fourth Set, upon which this motion to compel is based.

The disputed discovery answers from the Staff to the State's Fourth Set of Discovery to the Staff is limited to Requests for Admissions. While the discovery against the Staff may, in general, be on a different footing than discovery against other parties, this is not the case with Request for Admissions. Georgia Power Co (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-26, 40 NRC 93, 95-96 and n.4 (1994); *see also*, Georgia Power Co (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-26, 40 NRC 93, 95-96 ("[w]e consider a request for admissions to be an important way to narrow issues in a proceeding. To the extent that the Staff can carefully respond to these requests, it may find a way to make admissions that will narrow the matters in contention." *Id.* at 96). Neither 10 CFR § 2.742 nor any other NRC provision provides for any different treatment of the Staff. *Cf* 10 CFR § 2.742 and the special provisions for discovery against the Staff in §§ 2.720(h), 2.740(f)(3), 3.740a(j), 2.741(e), 2.744 and 2.790.

Unless otherwise determined by the Presiding Officer, discovery extends to "any matter, not privileged, which is relevant to the subject matter involved in the proceeding." 10 C.F.R. § 2.740(b)(1). The Commission gives its discovery rules the same "broad and liberal treatment" that is given to the discovery rules of the U.S. Federal Courts. Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 461-62 (1974). Discovery is considered relevant unless it is "palpable that the evidence sought can have no possible bearing upon the issues." *Id.* at 462, *quoting Hercules Powder Co. v. Rohn & Haas Co.*, 3 F.R.D. 302, 304 (D. Del. 1943). A motion to compel

need not seek information which would be admissible *per se* in an adjudicatory proceeding, and need only request information which “reasonably could lead to obtaining [admissible] evidence.” Safety Light Corp. (Bloomsburg Site Decontamination), LBP-92-3A, 35 NRC 110, 111-12 (1992); *see also*, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-102, 16 NRC 1597, 1601 (1982); Commonwealth Edison, *supra*, 7 AEC at 462.

II. THE DISCOVERY SOUGHT BY THE STATE IS RELEVANT TO THE ADMITTED BASES OF CONTENTION E.

The Staff intends to implement the Part 72 financial assurance requirement for the PFS facility through proposed license conditions. *See* Staff’s Safety Evaluation Report, Chapter 17 (as corrected and reissued January 4, 2000); Staff’s Response to Applicant’s Motion for Partial Summary Disposition, dated December 22, 1999. The Staff relies on similar license conditions (or commitments) to those made in the Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997) (hereafter “LES”). The State has a fundamental disagreement with the Staff’s approach. *See* State’s Response to Applicant’s Motion for Partial Summary Disposition, dated December 27, 1999, and the State’s Reply to the Staff, dated January 7, 2000. The State’s disputed discovery relates to how the Staff has implemented Part 72 in the past (Request for Admission No. 16), and to probe the extent of the Staff’s reliance on LES given the differences between the LES and PFS proposed facilities (Requests for Admission Nos. 24-29). If the Staff intends to rely on license conditions and the LES decision as a means

by which it will defeat Utah Contention E, then the foregoing Requests for Admissions are relevant to the State's ability to properly present its case at hearing. Moreover, such admissions may reasonably lead to the discovery of admissible evidence.

The Requests for Admissions dealing with PFS's Service Agreement and funding (Nos. 44 and 46) are relevant to how the Staff will determine what constitutes "reasonable assurance" that PFS will have sufficient funds to meet the financial assurance requirements of Part 72. Whether the Staff is to make that determination prior to license issuance, or, based on the license conditions, at some indeterminate future date, the basis for the Staff's determination is central to the State's ability to develop its case on Utah Contention E. *See* State's Reply at 12-13. *See also* Utah Contention E, Bases 2, 7, and 8.

Finally, the Request for Admissions about the relationship among PFS customers and defaulting PFS customers (No. 36) is relevant to how the Staff will determine whether PFS has the financial capability to cover contingent events, regardless of the license conditions, such that PFS has "reasonable assurance" of obtaining funds over the planned life of the proposed ISFSI. *See* Utah Contention E, Bases 2, 9, and 10.

III The Staff's Objections That the State's Requests Are Vague, Ambiguous, Speculative and the Like Are Without Merit.

Each of the disputed Requests for Admissions propounded upon the Staff references the "NRC Staff's Statement of its Position Concerning Group I-II Contentions," December 15, 1999, down to the paragraph number of a particular item. Thus, any complaint by the Staff that the State's questions are ambiguous or vague should

be looked at in light of the reference stated in each admission request. The relevance of the disputed requests for admissions is discussed above. Below is the State's rebuttal of the Staff's other objections.

The Staff objects to answering Request for Admission No. 16 (what showing the Staff has required for other ISFSIs licensed to a utility under Part 72) as vague, ambiguous and unduly burdensome. The Staff admits that PFS will not have Service Agreements executed until after a license is granted. Staff's Position page 3, Item 2, ¶ 4. Thus, the State's request seeks to find out what the Staff has allowed in the past for other Part 72 licensees. Moreover, the request is not burdensome because there are only a limited number of utility ISFSI licenses issued to date under Part 72.³

Requests for Admissions Nos. 24-29 relate to the LES case. Request No. 24 simply asks the Staff to admit that the PFS proposal under Part 72 is different from the LES proposal under Part 70. The State fails to see how this is vague, ambiguous, speculative or irrelevant as claimed by the Staff. The Staff's objections to Requests for Admission Nos. 25 and 29 are similar to No. 24 except that the irrelevance ground is replaced by a compound question objection. Again, the State's reference to a specific paragraph in the Staff's Position should narrow any such objections. Furthermore, if the Staff is going to rely on the LES decision to support the proposed license conditions as

³ Based on information the State obtained from the NRC Public Document Room ('PDR'), the State ascertains that there are, at most, twelve utilities that may have a Part 72 ISFSI license. See Exhibit 3, excerpt from an NRC PDR list of Part 72 licensee.

the mechanism for implementing Part 72, then the State maintains that such differences are discoverable. Thus, the State requests the Board order the Staff to respond to Requests for Admission Nos. 24 through 29.

Requests for Admission Nos. 44 and 46 deal with debt financing and the allocation of the revenue stream from Service Agreements. Request No. 44 is not vague or ambiguous as claimed by the Staff. For example, the term “documented market” is similar to the heading in Item 7 of the Staff’s Position. Moreover, the statement in Request No. 44 is consistent with the Staff’s Position, pages 5-6, Item 8. The Staff states: “PFS proposes that, if executed Service Agreements are not adequate to provide the required construction funding, it will pursue other means of financing...” Id at 6. The Staff lists such other means as commercial bank loans, bonds and additional equity contributions. Id. The State does not believe its request mischaracterizes the Staff’s or PFS’s position as the Staff has claimed, and the Request should be answered.

Request for Admission No. 46 poses the question: “if the income stream from the Service Agreements is used to fund the non-debt part of construction, then it is not available as collateral for a loan.” This is a straightforward question that the Staff objects to as vague, ambiguous and compound. The State has no objection if the Staff wishes to qualify its response but the Staff has made no effort at all to answer this Request.

Finally, Request No. 36 deals with how the allocation of responsibility among paying customers for contingencies, such as customer defaults, serious accident or off-normal events. PFS will rely on customer payments to fund its operations; therefore, the

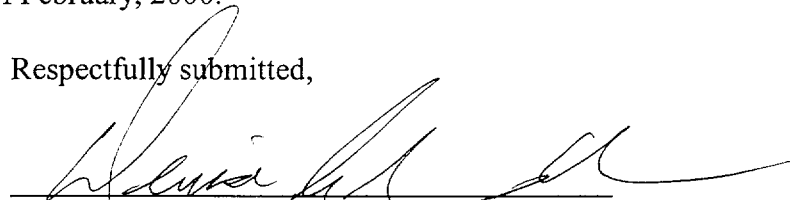
Staff's financial assurance determination should include how the Applicant will fund any shortfall in funding because of unexpected events.

CONCLUSION

For the foregoing reasons, the Staff's objections to not responding to the State's Fourth Set of discovery requests for Contention E, as described above, are without merit. Therefore, the Staff should be ordered to answer the above described Requests for Admissions.

DATED this 4th day of February, 2000.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Denise Chancellor", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S MOTION TO COMPEL
STAFF TO RESPOND TO STATE'S FOURTH SET OF DISCOVERY REQUESTS
was served on the persons listed below by electronic mail (unless otherwise noted) with
conforming copies by United States mail first class, this 4th day of February, 2000:

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Denise Chancellor
Assistant Attorney General
State of Utah

EXHIBIT 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	Docket No. 72-22-ISFSI
)	
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	February 4, 2000

DECLARATION OF MICHAEL F. SHEEHAN, Ph.D.

I, Michael F. Sheehan, declare under penalty of perjury and pursuant to 28 U.S.C. § 1746, that I assisted the State of Utah in preparing the State's fourth set of discovery requests to the NRC Staff, and that the statements contained in State of Utah's February 4, 2000 Motion to Compel NRC Staff to Respond to State's Fourth Set of Discovery Requests, relating to Utah Contention E, are true and correct to the best of my knowledge, information and belief.

Executed this 4th day of February 2000.

By:



Michael F. Sheehan, Ph.D.

EXHIBIT 2

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



JAN GRAHAM
ATTORNEY GENERAL

JAMES R. SOPER
Solicitor General

REED RICHARDS
Chief Deputy Attorney General

February 3, 2000

Sherwin Turk, Esq.
U.S. Nuclear Regulatory Commission
Office of General Counsel
Mail Stop-0-15 B18
Washington, DC 20555

via email (set@nrc.gov) and First Class Mail

re: Staff's Response to State of Utah's 5th Set of Discovery to the Staff.
Private Fuel Storage ISFSI, Docket No. 72-22


Dear Mr. Turk:

I refer to our telephone conversations yesterday and today where I advised you that the State was not satisfied with some of the Staff's responses to the above discovery. The State and the Staff reached resolution on the Document Requests but could not resolve some of the answers to Requests for Admissions.

First as to Document Requests, you agreed to provide a list of documents that the Staff relied upon in developing its position on Chapter 17 of the SER. You mentioned that those documents would be contained in the PFS docket and that you would list them such that I could identify the documents. In addition, you agreed to determine whether there are documents, additional to those in the docket, that the Staff relied upon and describe those documents to me.

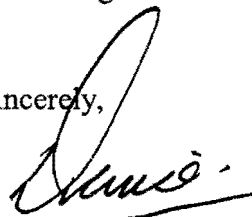
Second, Requests for Admission. There are a number of responses that the State considers to be non-responsive. The following are the requests on which that the State will file a Motion to Compel; the others the State will not pursue. Similar to our telephone discussion, I will group the requests into general categories.

1. Request for Admission No. 16 relates to whether the Staff required a showing of financial assurance prior to license issuance for all other ISFSIs licensed to a utility under Part 72. I stated that to my knowledge there were maybe 7 to 10 such licenses, and that the issue was relevant to how the Staff has previously implemented Part 72. You agreed to look at this further and let me know whether you can respond. If we cannot reach agreement by the end of the day tomorrow, I will include this request in the State's Motion to Compel.

2. The Admission Requests based LES (Nos. 24-29). In general the Staff responded that the requests were vague, ambiguous, speculative and constituted compound questions. The State believes that these requests are straight forward because the Staff's position and SER Chapter 17, rely on LES for employing license conditions to implement the financial assurance requirements of Part 72. Thus, it is reasonable for the State to enquiry into the differences between the proposed LES facility and PFS's proposed ISFSI.
3. Admission Requests about Service Agreement and Funding (No. 35, 44, and 46). The Staff raised similar objections to those stated in item 2 above. The Staff's responses are inadequate because Admission Request No. 35 calls for whether the Staff know of any reason why PFS would not give the Staff a copy of its Service Agreement; and Requests 44 and 46 relate to how PFS may obtain debt financing and whether PFS will have a sufficient income stream to repay debt. Regardless of the license conditions, these questions are relevant to the Staff's determination (either now or at some future indeterminate date) of what constitutes "reasonable assurance" that PFS will have sufficient funds to meet the requirements of Part 72.
4. Admission Requests about relationship among customers and defaulting customers (No. 36 and 49). Again the Staff's objections were similar to those stated in item 2 above. The Staff's answers are inadequate because the Staff's determination of how PFS's financial capability will cover contingent events, regardless of the license conditions, is significant to whether PFS will have "reasonable assurance" of obtaining funds over the planned life of the facility.

I will be available all day tomorrow. If you think we can reach agreement on any of the issues outlined above, please phone me at (801) 366-0286. If not, I intend to file a Motion to Compel by the end of the day tomorrow--the deadline for filing the motion.

Sincerely,



Denise Chancellor
Assistant Attorney General

cc: Paul Gaukler, Esq. Shaw Pittman (email only)
(paul_gaukler@shawpittman.com)

EXHIBIT 3

STATE'S EXCERPT FROM AN NRC PDR LIST OF PART 72 LICENSEES AND APPLICANTS
AS OF AUGUST 31, 1999

ISFSI LICENSES ISSUED TO UTILITIES UNDER PART 72:

7200001	GENERAL ELECTRIC CO. G.E. MORRIS ISFSI LICENSE NO: SNM-2500
7200003	CAROLINA POWER & LIGHT CO. H. B. ROBINSON ISFSI UNIT 2 LICENSE NO. : SNM-2502
7200004	DUKE ENERGY CORP. OCONEE ISFSI LICENSE NO: SNM-2503
7200005	WISCONSIN ELECTRIC POWER CO. POINT BEACH NUC. PLANT, UNITS 1&2 LICENSE NO: SFGL-03
7200007	CONSUMERS ENERGY CO. PALISADES NUCLEAR PLANT LICENSE NO: SFGL-01
7200008	BALTIMORE GAS AND ELECTRIC CO. CALVERT CLIFFS ISFSI LICENSE NO. : SNM-2505
7200009	PUBLIC SERVICE CO. OF COLORADO FORT ST. VRAIN ISFSI LICENSE NO: SNM-2504
7200010	NORTHERN STATES POWER CO. PRAIRIE ISLAND ISFSI LICENSE NO: SNM-2506
7200013	ENTERGY OPERATIONS, INC. ARKANSAS NUCLEAR ONE (ANO) LICENSE NO: SFGL-02
7200014	TOLEDO EDISON COMPANY DAVIS-BESSE NUCLEAR PWR STA #1 LICENSE NO: SFGL-04
7200015	GPU NUCLEAR CORP. OYSTER CREEK NUCLEAR GEN. STATION LICENSE NO: SFGL-05
7200016	VIRGINIA ELECTRIC & POWER CO. NORTH ANNA ISFSI LICENSE NO: SNM-2507