

21327

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

'00 FEB 29 P1:46

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

ORIGINAL
FILED
ADMINISTRATIVE
JUDGES

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
(Ruling on Motions Relating
to Witness Deposition)

Pending before the Board are several pleadings concerning the efforts of intervenor State of Utah (State) to obtain the deposition of an additional NRC staff witness regarding contention Utah H, Inadequate Thermal Design. See [State] Motion to Compel Deposition of NRC Staff Witness (Feb. 9, 2000) [hereinafter State Motion]; NRC Staff's Motion for Protective Order, and Response to "[State] Motion to Compel Deposition of NRC Staff Witness" (Feb. 16, 2000) [hereinafter Staff Response]; [State] Response to NRC Staff's Motion for Protective Order Regarding Utah Contention H (Feb. 23, 2000) [hereinafter State Response]. For the reasons set forth below, we deny the State's request that the staff be compelled to provide such a witness.

D502

From the pleadings, it appears that the dispute between the parties is whether the staff must produce an additional witness to testify about its review of the HI-STAR 100 storage cask system. The State asserts it is entitled to depose a witness with knowledge about the staff's review because of a reference to a staff evaluation of ANSYS computer code results relating to the HI-STAR 100 system in the preliminary Safety Evaluation Report (SER) for the HI-STORM 100 cask system that is to be used at the proposed Private Fuel Storage, L.L.C., (PFS) facility. Although, in a January 10, 2000 response to State admission requests, the staff apparently disavowed the use of this code as an evaluative tool, the State asserts it nonetheless is entitled to depose a staff witness with knowledge of the HI-STAR 100 review "for the purpose of exploring inconsistencies between representations made by the Staff in the SERs for the HI-STORM AND HI-STAR storage cask systems, and representations made by the Staff in response to discovery on Contention H." State Motion at 7; see State Response at 2-3.

The staff, on the other hand, declares that the State motion to compel should be denied, and a protective order entered in its favor relative to a State February 7, 2000 notice of deposition for an additional, albeit unnamed, staff witness to testify regarding the staff's HI-STAR 100

cask system SER. This result should obtain, the staff argues, because, among other things, the witness it will produce was responsible for (1) the staff's PFS facility thermal analysis and is fully capable of answering any questions on the extent to which the staff relies, or has relied, on the HI-STAR SER in its PFS facility thermal analysis; (2) presenting the preliminary HI-STORM 100 SER statements that are of concern to the State, and so can answer any questions about purported inconsistencies between representations in the HI-STORM and HI-STAR SERs; and (3) each of the staff's discovery answers, and so can respond to any questions about purported inconsistencies between the staff's SER statements and discovery representations. See Staff Response at 4-5.

Assuming the staff's representations are accurate regarding the knowledge of the witness it will produce relative to the staff's HI-STORM and HI-STAR SERs, it is not clear to the Board why this witness will not meet the State's information needs as it has defined them in its motion. In fact, in light of the staff's representations about this witness' knowledge, there seems to be an underlying assumption at work in the State's insistence that another witness be provided, i.e., that the State does not accept the answers provided by the staff in the admissions requests quoted in its pleadings indicating that,

notwithstanding the HI-STORM SER statement about the use of the ANSYS code for the HI-STAR SER, that code in fact was not part of the evaluative process relative to the HI-STAR cask system. At this juncture, however, given the staff's representations that the witness it will provide can respond to any questions about the meaning of these discovery responses, we see no basis for ordering the staff to make an additional witness available.¹

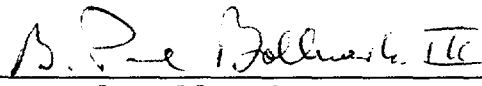
Accordingly, the State's February 9, 2000 motion to compel deposition is denied and the staff's February 16, 2000 motion for a protective order is granted relative to the State's February 7, 2000 notice of deposition of a staff

¹ In its admission responses, the staff indicated that the employee who did utilize the ANSYS code, albeit as a tool for better understanding the HI-STAR cask design and to confirm the ANSYS calculations, is no longer with the staff and apparently left no records concerning his use of the code. Although the staff cannot be compelled to provide a witness no longer in the agency's employ, the State could have sought a subpoena to obtain this individual's deposition testimony, a step it apparently decided not to take.

witness regarding the staff SER for the HI-STAR 100 cask system.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD²



G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

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

Rockville, Maryland

February 29, 2000

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, 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 (RULING ON MOTIONS RELATING TO WITNESS DEPOSITION) 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
(RULING ON MOTIONS RELATING TO
WITNESS DEPOSITION)

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

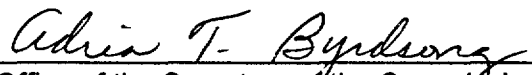
John Paul Kennedy, Esquire
Confederated Tribes of the Goshute
Reservation and David Pete
1385 Yale Avenue
Salt Lake City, UT 84105

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