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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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 22, 2000

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

Pursuant to 10 C.F.R. §§ 2.741, 2.744, and 2.790, the State hereby moves the Board to compel the Staff to answer certain document requests propounded in State of Utah's Fifth Set of Discovery Requests Directed to the NRC Staff (January 31, 2000) (hereinafter "State's Fifth Discovery Requests"). This Motion to Compel only relates to Utah Contention E (Financial Assurance). The Staff's inadequate discovery responses relating to Contentions H and L are addressed in the State's other motions to compel filed today.

FACTUAL BACKGROUND

The State submitted its Fifth Discovery Requests on January 31, 2000. The Requests included two document production requests to the Staff, Document Request Nos. 9¹ and 10² - Utah E, relating to how the Staff drafted and made final the proposed

¹ Document Request No. 9 - Utah E stated:

Please provide all documents that relate in any way to the two license

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license conditions, including the original recalled license conditions. On February 14, 2000, Staff responded in NRC Staff's Objections and Responses to the 'State of Utah's Fifth Set of Discovery Requests Directed to the NRC Staff (Utah Contentions E, H, and L)' (hereinafter "Staff Response Fifth Set"). The Staff objected to the two document production requests cited above on the grounds the requests are not relevant; the documents are available elsewhere; and the requests seek documents exempt from disclosure. Staff Fifth Response at 9-10.

The State contacted counsel for the Staff to discuss its objections to the Staff's discovery responses with respect to Contention E. The State also sent the Staff a letter on February 18, 2000 (attached hereto as Exhibit 1), setting forth the basis for the State's concerns regarding the deficiency of the Staff's responses with respect to Utah Contention E. Attorneys for the State and Staff could not resolve their disagreement. The unresolved issues relate to the original and reissued financial assurance license conditions proposed by the Staff.

conditions that appeared in the Staff's Safety Evaluation Report (SER), dated December 15, 1999, including how the conditions were developed.

Fifth Discovery Request, Document Request No. 9.

² Document Request No. 10 - Utah E stated:

Please provide all documents that relate in any way to the development of the two license conditions that appear in the Staff's corrected version of the SER, including how the conditions were developed.

Fifth Discovery Request, Document Request No. 10.

ARGUMENT

I. The Standard for Discovery Against the Staff.

NRC regulation 10 CFR § 2.744(c) sets out the standards for obtaining documents in discovery against the Staff.

If the Executive Director for Operations objects to producing a record or document, the requesting party may apply to the presiding officer, in writing, to compel production of that record or document. The application shall set forth the relevancy of the record or document to the issues in the proceeding.

10 C.F.R. § 2.744(c). The document must be produced if the presiding officer determines that (1) the requesting party has demonstrated the relevancy of the record, (2) the document is not exempt from disclosure under §2.790 or, if exempt, its disclosure is necessary to a proper decision in the proceeding, and (3) “the document or information is not reasonably obtainable from another source.” 10 C.F.R. § 2.744(d).

II. The Discovery Sought by the State Is Relevant to the Admitted Bases of Contention E, Is Necessary to the Proper Decision, and Cannot Be Obtained From Other Sources.

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 (“SER”), 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 two disputed document production requests submitted to the Staff relate to how the Staff drafted and made final the proposed license conditions, including the original recalled license conditions. The Staff objected to each document request on the grounds that:

(a) it seeks information that is not relevant to Utah Contention E and is not reasonably calculated to lead to the discovery of admissible evidence, (b) it seeks documents which may be available to the State from PFS or other sources, including, without limitation, the documents submitted by PFS in this proceeding, and applicable regulations, regulatory guidance and/or adjudicatory decisions in this and other proceeding(s), and (c) it seeks the disclosure of draft, predecisional or privileged documents that are exempt from disclosure under 10 C.F.R. § 2.790.

Staff Response Fifth Set at 9-10.

First, both document requests are relevant to Contention E and the documents are not available elsewhere; such documents are only available from the Staff. Documents relied on or generated by the Staff to develop the reissued license conditions are directly relevant to the criteria the Staff found necessary to establish whether the Applicant meets the financial qualifications of 10 C.F.R. § 72.22(e). Furthermore, juxtaposing the Staff's analysis for the reissued license conditions against the original, recalled license conditions may reveal the range of issues that went into the Staff's position on what is required for the Applicant to meet 10 CFR § 72.22(e). Thus, the document request relating to the original, recalled license conditions is relevant to show what matters the Staff once considered necessary to demonstrate financial qualification in accordance with 10 C.F.R. § 72.22(e), but which it no longer considers necessary. Specifically, Utah Contention E bases 2³ and 3⁴ relate to the Applicant's financial base and financial

³ Utah Contention E, Basis 2: "PFS is a limited liability company with no known assets; because PFS is a limited liability company, absent express agreements to the contrary, PFS's members are not individually liable for the costs of the proposed PFSF, and PFS's members are not required to advance equity contributions. PFS has not produced any documents evidencing its members' obligations, and thus, has failed to

strength to demonstrate its financial qualifications, and thus, demonstrate the relevance of the two requests. Moreover, such documents may also reasonably lead to the discovery of admissible evidence.

Second, the Staff argues that certain documents are available elsewhere. Staff Response at 9. The State agrees that the Staff need not provide, in response to this request, documents such as those submitted by PFS in this matter, or publicly available documents (*e.g.*, regulatory guidance or adjudicatory decisions). However, if the Staff relied on certain documents that are available elsewhere, the Staff should be compelled to name those documents so that the State may be able to obtain them. Furthermore, by listing examples of documents that it need not produce to the State, NRC Staff does not excuse itself from its obligation to produce documents that do not fit within those categories. The State is seeking copies of documents generated by the Staff in developing the original and reissued license conditions. Such documents are not available from the Applicant, the NRC Public Document Room, or elsewhere, and the Staff should be

show that it has a sufficient financial base to assume all obligations, known and unknown, incident to ownership and operation of the PFSF; also, PFS may be subject to termination prior to expiration of the license.” LBP-98-7, Appendix A, 47 NRC 142, 251.

⁴ Utah Contention E, Basis 3” “The application fails to provide enough detail concerning the limited liability company agreement between PFS's members, the business plans of PFS, and the other documents relevant to assessing the financial strength of PFS. The applicant must submit a copy of each member’s Subscription Agreement, see 10 C.F.R. Part 50, App. C., § II, and must document its funding sources.” LBP-98-7, Appendix A, 47 NRC at 252.

compelled to produce them.

Finally, although some documents may be draft or predecisional, the documents are necessary to a proper decision in this proceeding. The Staff has accepted license conditions as the mean by which the Applicant can demonstrate compliance with 10 C.F.R. § 72.22(e). Documents relating to the development of both the original and the reissued license conditions are necessary to understanding the Staff's rational for accepting the license conditions as a means for meeting 10 C.F.R. § 72.22(e). Furthermore, the original and reissued license conditions were proposed in the SER--a Staff decisional document released to the public. *See* December 15, 1999 (Original) SER at 17-7; and January 4, 2000 Reissued SER at 17-7. Thus, documents relating to the proposed license conditions should no longer be considered predecisional. Moreover, if the Staff takes the position that all the bases in Contention E (except basis 6) are satisfied because of the license conditions, then compliance with the foregoing Document Requests are reasonable and necessary to the State's ability to properly present its case at hearing.

CONCLUSION

For the foregoing reasons, the Staff's objections to not responding to the State's Fifth set of discovery requests for Contentions E, as described above, are without merit. Therefore, the Staff should be ordered to answer Document Request Nos. 9 and 10.

DATED this 22nd 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

MAR 1
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I hereby certify that a copy of STATE OF UTAH'S MOTION TO COMPEL
STAFF TO RESPOND TO STATE'S FIFTH AND SIXTH SETS 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 22nd day of

February, 2000:

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

Denise Chancellor
Assistant Attorney General
State of Utah

EXHIBIT 1

STATE OF UTAH

OFFICE OF THE ATTORNEY GENERAL



JAN GRAHAM
ATTORNEY GENERAL

JAMES R. SOPER
Solicitor General

REED RICHARDS
Chief Deputy Attorney General

February 18, 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 Fifth Set of Discovery to the Staff, Contention E
Private Fuel Storage ISFSI, Docket No. 72-22

Dear Mr. Turk:

This letter relates to the Staff's response to discovery on Contention E and is additional to the February 17 e-mail I sent you describing the inadequacies in the Staff's responses to discovery for Contention L and Diane Curran's e-mail on the same date about inadequate responses for Contention H.

While the State is concerned that the Staff refused to produce documents responsive to seven of the ten document requests, the State will only pursue the Staff's refusal to provide documents responsive to Document Requests Nos. 9 and 10 - Utah E. The State does not accept your objections and, unless we can reach agreement on these two requests, on Tuesday, the State will file a motion to compel production.

Document Request No. 9 requests documents relating to the two original license conditions that appeared in the Staff's December 15, 1999 Safety Evaluation Report (SER). Document Request No. 10 similarly requests documents relating to the two license conditions that appear in the recalled and reissued SER. Collectively, these documents are directly relevant to Utah Contention E in that they may show how the Staff reached the determination that the two reissued license conditions demonstrate PFS's financial qualification under Part 72. Moreover, documents relating to the original license conditions are also relevant with respect to why the Staff determined that additional standards in the original license conditions were no longer required for the Applicant to meet the requirements of 10 CFR § 72.22(e). Because the Staff itself issued the SER containing the original and reissued license conditions, only the Staff would


Sherwin Turk, Esq.

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have documents that "relate in any way to the two license conditions ... in the SER, including how the conditions were developed." *See* Document Requests No. 9 and No. 10. Thus, to the extent documents exist that are not privileged, the State believes those documents should be produced.

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 on February 22, 2000.

Sincerely,

A handwritten signature in dark ink, appearing to read "Denise Chancellor", written over the typed name.

Denise Chancellor
Assistant Attorney General

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