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US-NRCUNITED 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
(Independent Spent Fuel
Storage Installation)

ASLBP No. 97-732-02-ISFSI

March 7, 2000

STATE OF UTAH'S RESPONSE TO
NRC STAFF'S MOTION FOR PROTECTIVE ORDER
(UTAH CONTENTION E)

The State of Utah hereby responds to the NRC Staff's February 29, 2000, "Motion for Protective Order and Response to State of Utah's Motion to Compel NRC Staff to Respond to State's Fifth Set of Discovery Requests (Contention E)" ("Motion for Protective Order"). The Staff seeks a protective order in response to State's February 22, 2000, Motion to Compel NRC Staff to Respond to State of Utah's Fifth Set of Discovery Requests (Contention E) ("Motion to Compel").

The contested discovery involves two document requests that relate to license conditions announced in Chapter 17 of the Staff's Safety Evaluation Report ("SER"). The Staff, through these license conditions, will allow the Applicant to meet the substantive requirements of 10 CFR § 72.22 in its entirety, without anything more than a determination of construction and operating costs. Therefore, the Staff's rationale for accepting certain license conditions is central to a proper decision in this proceeding.

In its Motion for Protective Order at 6, the Staff, for the first time says it "will undertake to identify the publicly available documents upon which it relied." The State

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appreciates the Staff's offer to disclose the identify of these documents. Nonetheless, the State believes that the Staff has not met its burden of showing that the documents the Staff seeks to withhold are privileged or exempt from disclosure. Accordingly, the Staff's Motion for a Protective Order should be denied.

ARGUMENT

I. The Document Requests to the Staff Are Relevant.

The standard for discovery with respect to requests to the Staff for production of documents is one of relevance. *See* 10 C.F.R. § 2.744(a). The standard of relevance in discovery is very broad, and includes information that could reasonably lead to the discovery of admissible evidence. Safety Light Corporation (Bloomsburg Site Decontamination), LBP-92-3A, 35 NRC 110, 111-12 (1992). Moreover, relevant documents must be produced if not exempt from disclosure under 10 CFR § 2.790, and even if exempt from disclosure under § 2.790 must still be produced pursuant to § 2.744(d) if "necessary to a proper decision in the proceeding" and "not reasonably obtainable from another source." Contrary to the Staff's argument, the State's discovery requests meet these standards.

Documents relating to the two original and reissued license conditions are relevant and critical to the State's development of its case. In the original December 15, 1999 SER and the January 4, 2000 reissued SER, the Staff takes the position that "PFS be required to meet [two] financial assurance [license] conditions before constructing or operating the Facility . . . in order to demonstrate compliance with 10 CFR 72.22(e)." Original SER at 17-4; Reissued SER at 17-4. Thus, compliance with the specific standards, or lack thereof, set out in the license conditions is key to PFS's demonstration of its financial qualifications.

Documents relating to the rationale behind how the Staff developed both the original and the reissued license conditions are necessary to the State's development of its case for hearing. The license conditions present two very different ways by which the Applicant may meet the requirements of 10 CFR § 72.22. The license conditions proposed in the original SER contain more rigorous requirements than those in the re-issued SER. For example, original license condition LC17-1 required "firm commitments ensuring funds for the remaining project costs, as well as sufficient funding to cover the estimated costs of decommissioning" prior to construction. Original SER at 17-7. Additionally, original license condition LC17-2 would prohibit construction and operation unless PFS had "in place long-term Service Agreements with prices sufficient to cover both construction and operating costs." *Id.* (emphasis added). By contrast the reissued license condition, LC17-1, only requires funds adequate to construct a facility with the initial capacity specified by PFS. Reissued SER at 17-4. Accordingly, under the reissued license condition, the Staff must perform a post license seriatim financial review of the Applicant's pay-as-you go approach to financing construction, in addition to conducting another post license seriatim financial review of the Applicant's ability to finance phased facility operations. Therefore, the State should be entitled to learn why the Staff initially published license conditions that were more stringent than what the Staff now appears to find acceptable under 10 CFR § 72.22. The documents relating to the differences between the original and reissued license conditions and the development of those license conditions are both relevant to Contention E, in

particular Basis 2.¹

II The Staff Has Not Met its Burden of Showing That the Withheld Documents Are Exempt from Disclosure.

The Staff asserts that, other than relevance, the issue for the Board to decide is whether non-publicly available documents are exempt from disclosure under 10 CFR § 2.790, and if exempt, whether disclosure is necessary to a proper decision in the proceeding. Motion for Protective Order at 6. The Staff invokes the deliberative process privilege and the attorney-client privilege, citing to 10 CFR § 2.790(3) and (5) [sic] to justify its withholding documents that may be responsive to the two document requests. *Id.* at 6-7. The Staff also asserts that pre-decisional documents are protected from disclosure even after the agency issues its final decisional document. *Id.* at n. 7.

The Commission in Georgia Power Co. (Vogtle Electric Generating Plan, Units 1 and 2), CLI-94-5, 29 NRC 190, 197 (1994), addressed the Staff's reliance on the exemption under 10 CFR § 2.790(a)(5) to withhold documents and found the exemption similar to Exemption 5 of FOIA. In the litigation context, the Commission found "the deliberative process privilege is a qualified, not absolute, privilege" and "[t]he government's interest in confidentiality is balanced against the litigant's need for the information." Georgia Power, 29 NRC at 198. Moreover, the Staff "bears the initial burden of showing the privilege should be invoked," and once the privilege has been established, "the litigant seeking the

¹ Basis 2 states: "Contrary to the requirements of 10 C.F.R. §§ 72.22(e) and 72.40(a)(6), the Applicant has failed to demonstrate that it is financially qualified to engage in the Part 72 activities for which it seeks a license it that . . . [PFS has] failed to show that it has a sufficient financial base to assume all obligations." LBP-98-7, 47 NRC 142 (Appendix A) at 251.

information must demonstrate an overriding need for the material.” Id.

The Staff claims that the withheld non-publicly available documents consist of “internal or draft Staff documents that reflect the Staff’s internal deliberative process” and “attorney-client communications.” Motion for Protective Order at 6. The Staff’s attempts to show that the privilege has been invoked by emphasizing that the document requests relate to the “development” of the two sets of license conditions, which are the subject of the document requests. Id. at 7. This appears to be the sum and substance of the Staff’s showing. Such a showing is inadequate to invoke the privilege.

While the exemption may cover internal or draft Staff documents, the Staff must show that the subject documents reflect the personal opinions of the writer rather than the policy of the agency and that the documents are recommendatory in nature rather than a draft of what will become a final document.² Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). Furthermore, even when a document may be pre-decisional at the time it is prepared, it can lose that status if it is adopted as the agency position on an issue or is used by the agency in its dealings with the public. Id.

To date, the Staff has not produced a log listing material, otherwise discoverable, that it claims is privileged. The federal rules of civil procedure require, in such circumstances as this, that the party withholding discoverable information describe the

² Types of documents intended to be protected under the deliberative process include suggestions or recommendations as to what agency policy should be; advice to a superior; suggested disposition of a case; or a step in the adjudicatory process. Straightforward explanations of agency regulations in specific factual situations are not protected by the deliberative process privilege. Coastal States, 617 F.2d at 868.

nature of the documents in a manner that, without revealing information itself privileged, will enable other parties to assess the applicability of the privilege. *See* Fed. R. Civ. P. 26(b)(5). Likewise, in this case, the Staff must describe the nature of the documents in a manner that, without revealing privileged information, will enable the State to assess the applicability of the privilege. Accordingly, the Staff's meager discussion of the types of documents it claims are privileged is not adequate to establish the privilege.

III. The Documents Are Necessary to a Proper Decision in this Proceeding.

Even if the Board finds that the Staff has established the claimed privilege, the documents may still be required to be produced if they are necessary to a proper decision in the proceeding. 10 CFR § 2.790(c). In this proceeding, the Applicant has consistently refused to answer relevant discovery because it claims that the license conditions answer most inquiries. *See* various State of Utah motions to compel the Applicant to answer discovery currently pending before the Board. Now the Staff is unwilling to answer discovery about the rationale behind the licence conditions. The State is left in the intolerable position of obtaining next to no discovery from either the Applicant or the Staff relating to the whether the Applicant meets the financial qualification of Part 72. As the court noted in Coastal States, an agency should not be permitted to develop a body of secret law used in the discharge of its regulatory duties. 617 F.2d at 867. Moreover, the scope of Exemption 5 is narrow and FOIA has a strong policy that the public is entitled to know what its government is doing; therefore, "the exemption is to be applied 'as narrowly as consistent with efficient Government operation.'" *Id.* at 868 (citation omitted). Such is the case here. The Staff has discharged its regulatory duties by accepting license conditions that

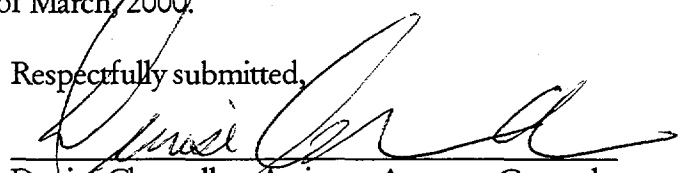
leave the public and the State with no idea of how those conditions will operate and why such conditions satisfy the requirements of Part 72. In the instant case, the agency's interest in confidentiality is outweighed by the litigant's need for the information. See Georgia Power, 29 NRC at 198. Accordingly, the Staff should be ordered to produce all documents responsive to the two document requests.

CONCLUSION

For the foregoing reasons, the Staff's Motion for a Protective Order should be denied and the State's Motion to Compel production of documents should be granted.

DATED this 7th day of March, 2000.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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I hereby certify that a copy of STATE OF UTAH'S RESPONSE TO
NRC STAFF'S FEBRUARY 29, 2000 MOTION FOR PROTECTIVE ORDER
REGARDING UTAH CONTENTION E was served on the persons listed below by
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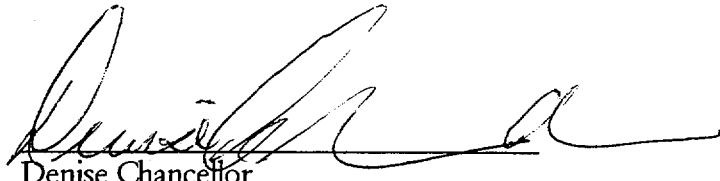
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A handwritten signature in black ink, appearing to read "Denise Chancellor", written over a horizontal line.

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