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USRCUNITED 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 L)

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 and Sixth Sets of Discovery Requests (Contention L)" ("Motion for Protective Order"), which was filed in response to the State's February 22, 2000, Motion to Compel NRC Staff to Respond to State of Utah's Fifth and Sixth Sets of Discovery Requests (Contention L) ("Motion to Compel").

The contested discovery involves one document request from the State's Fifth Set of Discovery to the Staff, and seven requests for admission (Nos. 10 through 16) and two interrogatories (Nos. 3 and 4) from the State's Sixth Set of Discovery to the Staff (Sixth Set). In general, the State seeks information about the Staff's position on what methodology and standards the Staff will permit the Applicant to employ to meet 10 CFR § 72.102. Such information is relevant to whether PFS will meet the requirements of the foregoing regulation. The Staff maintains that it has either responded to discovery, or objected to the requested discovery and that it is entitled to a protective order. The Staff's

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motion should be denied.

ARGUMENT

I. The Discovery Against the Staff Is Relevant and Necessary to a Proper Decision in this Proceeding.

The standard for discovery with respect to requests for admission and requests to the Staff for production of documents is one of relevance. *See* 10 C.F.R. §§ 2.742(a), 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). Contrary to the Staff's argument, the State's discovery requests meet that standard.

Pursuant to 10 C.F.R. § 2.720(h), the standard for interrogatories to the NRC Staff is whether the answers are (a) reasonably available from some other source and (b) they are necessary to a proper decision in the proceeding.

A. The State's Discovery Is Timely.

The Staff argues that the State's discovery concerning the issues surrounding the Applicant's seismic exemption request is premature. This argument should be rejected because the discovery propounded on the Staff is timely based on the Staff's position in the Safety Evaluation Report (SER). Regardless of the Staff's insistence that it has not taken a position with respect to the Applicant's seismic exemption request, the SER states that "the staff has determined that a 2,000-year return value with the PSHA methodology can be acceptable." *Id.* Even though the Staff maintains that it has not specifically approved the Applicant's seismic exemption request, the Staff has explicitly stated in the SER that the

terms of the request “can be acceptable.” SER at 2-44. Moreover, the Staff in the SER concluded: “The Staff agrees that the use of the PSHA methodology is acceptable, [sic] however, the SAR analyses need to be revised to consider a 2,000-year return period, rather than a 1,000-year return period.” Id. at 2-45. To the extent that the Staff’s evaluation will impact the adjudication of Contention L, the State’s discovery with respect to the seismic exemption request is relevant. The discussion below demonstrates that all the disputed discovery is relevant, may lead to the discovery of admissible evidence and is also necessary to a proper decision in this proceeding.

B. All of the Disputed Discovery Is Relevant and Necessary to a Proper Decision.

1. Fifth Set of Discovery, Document Request No. 4.

Document Request No. 4 requests specific cask stability analyses relied upon by the Staff to justify the use of a 2,000 year return interval. The Staff argues that “[t]he Applicant’s seismic exemption request is not based upon ‘cask stability analyses,’ nor does the Staff’s review of that request include consideration of a cask stability analysis.” Motion for Protective Order at 5. The State is merely requesting documents to the extent the Staff is relying on such documents. If the Staff is not relying on any specific cask stability analyses, the Staff need only state it has no documents rather than seek a protective order.

2. Sixth Set of Discovery, Request for Admission Nos. 10, 11, and 12.

The purpose of these Requests is to ascertain the Staff’s understanding of key components of the referenced documents because the documents relate directly to the way in which the Staff articulated its position in the SER. Therefore, the State cannot obtain the

information elsewhere. The Staff's objection that if the State wanted to know the Staff's understanding of the referenced documents, "it could have done so in a clear manner, preferably in the form of interrogatories" is without merit. Motion for Protective Order at n. 7. The three Requests begin with the phrase "do you admit." The term "you" is defined as "officers, employees, agents, servants, representatives, attorneys or other persons directly or indirectly employed or retained by the Staff of the U.S. Nuclear Regulatory Commission or anyone acting on its behalf or otherwise subject to the Staff's control." Sixth Set at 4. Thus, the three requested admissions ask the Staff to either admit or deny whether (a) a certain standard is contained in a referenced document (Request No. 10); (b) the Staff realized that a document it relied on in the SER has been superceded (Request No. 11); and (c) the Staff is aware that standards in certain referenced documents are not intended for high level nuclear waste facilities (Request No. 12). The Staff should be ordered to answer the Requests because they are relevant and necessary to a decision in this proceeding.

In the SER, the Staff gives four reasons why it believes "a 2,000-year return value with the PSHA methodology can be acceptable." SER at 2-44 to 45. The four reasons, however, do not include any justification for the 2,000 year return period based on the requirements stated in NRC rulemaking plan SECY-98-126. See, Request for Admission No. 10. Information that may be obtained from a complete response to Admission Request No. 10 is relevant to understanding why the ad hoc criteria developed by the Staff deviated from the Commission's plan to change 10 CFR § 72.102, and conversely, why the standards under the Commission's Rulemaking Plan are not applicable to the Applicant's seismic exemption request. To the extent that PFS may meet the seismic requirements of Part 72 through

actions by the Staff, the State submits that Request for Admission No. 10 may lead to the admission of discoverable evidence. Moreover, such discovery will go to the weight of the Staff's testimony.

One of the Staff's four reasons for accepting a 2,000 year return period PSHA is based on the Uniform Building Code and the National Earthquake Hazards Reduction Program (International Conference of Building Officials, 1994; Building Seismic Safety Council, 1995), the subject of Request for Admission Nos. 11 and 12. *Sæ* SER at 2-45. The Staff complains that the Request for Admission Nos. 11 and 12 are "impermissibly compound and include unacceptable predicates." Staff's Motion at n. 8. The Staff also complains about the use of the term "building code" to refer to a document. *Id.* The two Requests are carefully worded and cite to the SER at 2-45. There can be no doubt as to which documents the State is referring and to their relevance. To the extent that the Staff relies on ad hoc standards from the building code documents cited in the Requests to ground its decision to allow the Applicant to use a PSHA with a 2,000 year return period, the Requests are relevant and go not only to the weight of the Staff's testimony but also to whether the Applicant can meet the requirements of 10 CFR § 72.120.

3. Sixth Set, Request for Admissions Nos. 13, 14, 15 and Interrogatory No. 3.

The State submitted Request for Admission Nos. 13, 14 and 15 to the Staff in order to juxtapose what is required under the current Part 72 regulations, *i.e.* a true deterministic seismic hazard analysis (DSHA), and (1) the seismic analysis PFS initially conducted, *i.e.*, a hybrid PSHA/DSHA to estimate the 84th percentile deterministic ground motions

(Admission Request No. 15), and (2) what design basis ground motions the Staff may allow under PFS's seismic exemption request, *i.e.*, design basis ground motions with an estimated average return period of 2,000 years (Admission Request No. 13) or 10,000 years (Admission Request No. 14). These admissions are paired with Interrogatory No. 3,¹ which asks the Staff to explain the acceptable means for determining whether or not the design basis ground motions had been exceeded in the aftermath of a seismic event.

The Staff objected that the language of these Admission Requests is vague and ambiguous and further that the Requests constitute compound questions. Motion for Protective Order at 9. Notwithstanding that the Staff complains that Request for Admission No. 11 "is impermissibly compound and includes unacceptable predicates," the Staff now complains that Requests for Admission 13, 14 and 15 "lack the necessary predicates and definitions" to support the statement in the admission. *See* Motion for Protective Order at n. 9. Furthermore, the Staff maintains that Request for Admission No. 15 relates to "some undefined design basis." *Id.* The Staff's objections are without merit and do not support the issuance of a protective order.

The State's requests may lead to admissible evidence for the following reason. A true DSHA required by Part 72 yields controlling parameters for design (namely, design basis ground motions) that correspond to the maximum vibratory ground motions. However, if the design basis ground motions derive from a hybrid, less conservative DSHA or from a PSHA with a 2,000 year or 1,000 year return period, then perforce they are less

¹ To the extent that the Staff admits any of the three requests for admission.

than the maximum and there is some probability that they will be exceeded. The reason for the State's requests for admission is to determine whether or not the Staff agrees with the State's position. The question of what design basis ground motions the Staff will accept for the PFS facility is central to whether the PFS facility will meet the requirements of 10 CFR § 72.102. Thus, the structure of the State's discovery, first, to request admissions from the Staff about credible events based on standards that are less conservative than required by current regulations, and second, to follow up with an interrogatory about acceptable means for determining whether or not the design basis ground motions had been exceeded, is necessary to a proper decision in this proceeding, could lead to admissible evidence, and at the very least, such evidence would go to the weight of the Staff's testimony.

The Staff's complaint that Admission No. 15 relates to an "undefined design basis" offers no support for the Staff's request for a protective order. *Sæ* Motion for Protective Order at n. 9. The Staff is not acting in a vacuum. It has a body of knowledge about Contention L that makes Request for Admission No. 15 readily understandable, if not by its attorneys, then by its technical staff. The "undefined design basis" referenced by the Staff is the analysis performed by PFS. *Sæ* discussion and Geomatrix Report referenced in State's Motion Requiring Applicant to Apply for Rule Waiver Under 10 CFR § 2.758(b) or in the Alternative Amendment to Utah Contention L (April 30 1999) at 4-6. There should be no confusion in answering this admission.

4. Sixth Set, Request for Admission No. 16 and Interrogatory No. 4.

Like the above discovery, Admission No. 16 and Interrogatory No. 4 are paired. To the extent that the Staff does not admit Request for Admission No. 16, it is not required to

answer the interrogatory.

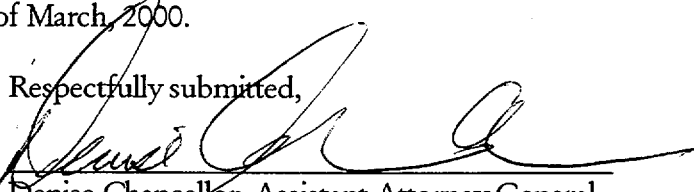
The State's discovery is relevant to what methodology and standards the Staff will permit the Applicant to employ to meet 10 CFR § 72.102. The State's Request is necessary to discern whether the Staff considers the concept of cask tipover a factor to take into the consideration in determining what design basis ground motion is acceptable at the PFS site. Therefore, the Request is relevant because it may lead to discoverable evidence regarding what design basis ground motion is acceptable for the PFS site (*i.e.* whether DSHA, or PSHA with 2,000 year or 10,000 year return period.).

CONCLUSION

There are no new arguments raised by the Staff in its Motion for a Protective Order that overcome the State's Motion to Compel. Therefore, based on the foregoing reasons, the Licensing Board should grant the State's Motion to Compel and deny the Staff's Motion for a Protective Order.

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 L was served on the persons listed below by
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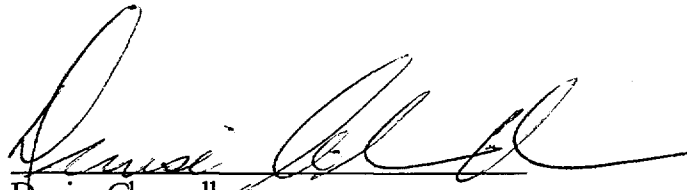
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A handwritten signature in black ink, appearing to read "Denise Chancellor", written over a horizontal line.

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