

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'98 DEC -7 P5 :56

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))	December 1, 1998

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATION STAFF

STATE OF UTAH'S REQUEST FOR EXTENSION
OF INFORMAL DISCOVERY PERIOD

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.718(e) and (f), and the Board's June 29, 1998, Memorandum and Order (General Schedule for Proceeding and Associated Guidance) (hereinafter "Scheduling Order"), the State of Utah hereby requests an extension of the informal discovery period for (1) Contentions L (Geotechnical) and GG (Cask Stability) until fourteen days after PFS submits its response to the NRC Staff's first Request for Additional Information ("RAI") regarding geotechnical issues, or approximately January 31, 1999; (2) contentions affected by a second round of Requests for Additional Information until 14 days after the Applicant submits a complete response to the NRC Staff on the relevant contention; and (3) an extension of the informal discovery schedule for all of its other contentions until January 31, 1999. Along with the foregoing request, the State asks that commencement of the formal discovery period be advanced to correspond with the end of the requested

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extension to the informal discovery period. Finally, the State requests the Board to add to the agenda of the upcoming December 11, 1998, prehearing conference, the general question of extension of the informal discovery schedule given the new circumstances that have arisen since the Board set the initial schedule.¹

The State has contacted counsel for the other parties regarding the requested extension. The Confederated Tribes and Ohngo Gaudadeh Devia stated that they support this motion. PFS stated that it will file a written response to the State's motion. The NRC Staff stated that on or before the December 11, 1998, prehearing conference, it expects to be able to inform the Board and parties regarding which contentions are affected by the second round of RAIs. The Staff stated that it would take no position regarding an extension of the discovery schedule against parties other than the Staff with respect to Contentions L and GG, or those contentions affected by the second round of RAIs; however, the Staff would oppose an extension with respect to any other contention that is within the time provided by the Board's scheduling order.

II. FACTUAL BACKGROUND

The Board's Scheduling Order divides the contested issues in this case into three groups, depending on the Staff's expected date for reaching a position on the issues. The Staff expected to take a position on the first group by December 31, 1998;

1. The Staff does not oppose the State's requested addition to the prehearing conference schedule.

on the second group by April 30, 1999; and on the third group by September 2000. The expected timing of the Staff's position depended in part on the schedule for issuing RAIs and receiving responses to them.

At the time the Scheduling Order was issued, the Staff expected to receive all responses to its April 1, 1998, RAI by December 15, 1998. *See* Letter from Ernest L. Blake to Administrative Judges (May 15, 1998). In the most recent Joint Status Report, filed with the Board on November 24, 1998, PFS reports that it now expects to complete its response to the seismic RAIs by mid-January instead of December 15, 1998, as originally scheduled. Letter from Paul A. Gaukler to Administrative Judges (hereinafter "November Joint Status Report").

The Staff's anticipated schedule for taking a position on contentions was a "best-case scenario," (e.g., a single round of RAIs). *See* Letter from Sherwin E. Turk to Administrative Judges (November 24, 1998) (hereinafter "Staff's November 1998 Status Report").² Now the Staff will issue a second round of RAIs by December 11, 1998 that relate to issues in Group I and Group II contentions. *Id.* In setting the litigation schedule for this proceeding, the Board took into account the Staff's anticipated dates for reaching its position on the contested issues. Scheduling Order at 4. However, the need for a second round of RAIs and the mid-January response by the Applicant to

2. At the time the schedule was proposed the Staff advised the Board that it would need to await the Applicant's responses to the first round of RAIs before it could determine whether a second round would be required. *Id.*

seismic issues were not before the Board when it set the litigation schedule.

III. ARGUMENT

A. Request for Extension of Time for Informal Discovery on Contentions L and GG

In setting the litigation schedule for this case, the Board recognized that the schedule might need to be adjusted if the Staff's safety and environmental review schedule changes. Scheduling Order at 4. The State respectfully submits that because of anticipated changes in *both* the schedule for RAI responses and the date on which the Staff is likely to reach its position on all admitted contentions, a revision of the discovery schedule is needed to ensure fulfillment of the purposes of discovery as established in the Scheduling Order, and provide a meaningful hearing opportunity to the Intervenors.

In the Scheduling Order, the Board described informal discovery as "an opportunity to seek and provide access to a significant amount of the relevant information regarding the admitted contentions." *Id.* at 5. Its purpose is to:

provide the parties with the 'big picture' relative to the contested issues and allow the much briefer period of formal discovery to be used for delving into more specific matters about which information uncertainties remain.

Id. In light of the significant opportunity to conduct informal discovery, the formal discovery period established by the Scheduling Order is quite brief, amounting to only sixty days.

Consistent with these purposes, the Scheduling Order did not terminate

informal discovery until two weeks *after* PFS was due to file its last response to an RAI. Although the Board did not explicitly address the issue in the Scheduling Order, the apparent intention of the schedule was to ensure that the parties were in possession of any new information or changes that might be generated by responses to the RAIs. Armed with such "big picture" information, the Intervenors presumably would be prepared to then conduct formal discovery in an effective and efficient way, taking full advantage of the extremely tight two-month timeframe permitted.

The recent announcements by PFS and the Staff, regarding delays by PFS in answering the first round of RAIs on seismic issues and the Staff's plans to issue another round of RAIs will deprive the State of the crucially important opportunity to obtain most of the relevant documentation regarding the license application through informal discovery, before formal discovery begins. Although it is not yet clear which of the contested issues are affected by the anticipated second round of RAIs, it appears certain that PFS will not file its response to the first RAI on seismic issues until mid-January, two weeks after informal discovery has ended and formal discovery has begun. Furthermore, it is unlikely that PFS will respond to the second RAIs by the end of December. Thus, the State will be handicapped in conducting formal discovery, by not having critical relevant information in hand before the formal discovery process begins.

Therefore, in order to ensure that the State has an adequate opportunity to

conduct its discovery regarding seismic issues raised by Contentions L and GG, the State requests that the Board extend the deadline for completion of informal discovery until fourteen days after PFS files its response to the April 1, 1998, RAI on seismic issues. The same rationale applies to the requested extension for contentions affected by the second RAIs. The requested extension should not, by itself, affect the overall schedule for litigation. This is because the schedule hinges principally on the Staff's dates for reaching its positions, which is likely to be correspondingly delayed by PFS's own delay in making its response.

B. Request for Extension of Time for Informal Discovery on All Contentions

The State also submits that there are a number of additional reasons that warrant an extension of the informal discovery schedule for all other contentions, in addition to those contentions affected by delayed responses to the RAIs that will come in after the end of the year. During the period permitted for informal discovery, the State has diligently conducted its own discovery and responded to discovery requests by PFS and other parties. Due to several factors, however, the time permitted has not been adequate to complete informal discovery, and prepare adequately to complete formal discovery during the two-month discovery period provided by the Board.

First, informal discovery has involved the production of a large quantity of documents that have not yet been completely produced by either PFS or the State. To date, the State has produced tens of thousands of pages of documents requested by PFS.

The State is still in the process of responding to requests for a significant quantity of additional documents, which should be ready by late December. PFS produced a large volume of documents in mid-October, but the State has requested additional documents that have not yet been produced. *See* Letter from Connie S. Nakahara to Ernest L. Blake (October 21, 1998), a copy of which is attached as Exhibit 1. PFS plans to produce those documents by the first of December. November Joint Status Report at 2. The State needs additional time to review the additional documents produced by PFS and prepare to use them in informal interviews (now being scheduled), as well as formal discovery.

Second, the combined effort of responding to PFS's discovery and conducting the State's own discovery has been extremely time-consuming, such that informal discovery cannot be completed effectively within the allotted time. The State is liberally responding to PFS's broad discovery requests which currently encompass ten to fifteen State agencies. Many of the agencies perform critical functions for the State, such as regulatory and safety missions. Responding to the Applicant's requests would be analagous to NRC being required to produce documents located in other federal agencies and organizations such as the White House, Fish and Wildlife Service, Federal Emergency Management, the Environmental Protection Agency, among others.

Many of the agencies from which the Applicant has requested the regulatory history of hazardous facilities have hundreds of thousands of pages of documents for

each facility. Because of the number of agencies and the vast quantity of documents within each agency, the State eased the Applicant's discovery effort by helping to narrow the files in which the requested information may be contained. However, the significant amount of time consumed by this effort to be responsive to the Applicant's request has delayed the State's own efforts to gather documents from PFS, review them, and conduct interviews.

A significant amount of time has also been required to prepare a privilege log, and to schedule and prepare for interviews of knowledgeable persons. As a result, the State is unable to fulfill its obligations to provide informal document discovery to PFS, or to complete its own informal document discovery such that it is prepared to commence formal discovery by December 31.

Moreover, because so much time has been required to respond to PFS's document and interview requests and to conduct the State's own document discovery, the State has not had sufficient time to conduct its own informal interviews until the month of December. The State expects to be conducting interviews of PFS witnesses during at least three weeks in December. This leaves little or no time to digest the results of the interviews and compose interrogatories in time to be prepared for the commencement of formal discovery around the first of January. In addition, although the State is diligently attempting to schedule as many interviews as possible in December, it is difficult to schedule attorneys and experts for the holiday period.

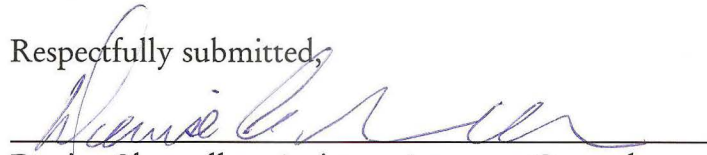
Finally, the requested extension should have little, if any, effect on the ultimate schedule for conclusion of this proceeding. As discussed above, the trial schedule depends principally on the Staff's schedule for reaching positions on the contested issues. Based on the most recent status reports, it appears that the Staff's ability to reach a position will be delayed on Contention L by the delay in PFS's response to the RAI on seismic issues. It will also be delayed for an unknown number of other issues, due to the need to conduct another round of RAIs. Therefore, the requested extension would cause no overall delay.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests an extension of the informal discovery period in this proceeding and requests an opportunity to address this issue at the Prehearing Conference.

DATED this 1st day of December, 1998.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of STATE OF UTAH'S REQUEST FOR '98 DEC -7 P5:56
EXTENSION OF INFORMAL DISCOVERY PERIOD were served on the persons
listed below by electronic mail (unless otherwise noted) with conforming copies by

United States mail first class, this 1st day of December, 1998:

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October 21, 1998

SENT VIA E-MAIL AND REGULAR MAIL

Ernest L. Blake Jr., Esq.
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Dear Mr. Blake:

Re: *In the Matter of Private Fuel Storage, LLC,*
Docket No.: 72-22-ISFSI
Informal Discovery

We have completed reviewing all files available to us at Parsons Behle and Latimer and on October 21, received copies of various requested documents. However, we were not given access to your files containing Holtec proprietary information due to the specific nature of the Proprietary Agreement between the State of Utah and Holtec International Corporation. It is my understanding that you or your co-counsel are determining whether the Proprietary Agreement between the State of Utah and Holtec encompasses the documents in your proprietary files.

Please advise me of your determination as soon as possible. If you determine that the Proprietary Agreement will not allow the State access to the Holtec documents, please advise us how we may obtain access to those files.

In addition to the files currently located at Parsons Behle and Latimer, the State of Utah is making a preliminary request that PFS make available the following documents:

1. An electronic copy of the raw seismic reflection data recently collected by Bay Geophysics on the Skull Valley Reservation and surrounding areas, including Bureau of Land Management property. In addition to the foregoing, provide any field notes and project summaries as well as any other data and field notes relating to the seismic studies.
2. Any and all documents relating to a plant or vegetation survey conducted or to be conducted on behalf of PFS. This request includes the criteria established for conducting

such a plant survey, qualifications of the entity conducting the survey, correspondence to or from any federal or state agency, field notes, and draft and final reports relating to the study.

3. Any and all documentation relating to contentions in the possession of the Skull Valley Band of Goshutes, its members or its attorney.
4. Any and all documentation relating to the Department of Energy's calculation of construction, operation and maintenance, and decommissioning costs for a Monitored Retrievable Storage Facility proposed for the Skull Valley Goshute Reservation.
5. Any and all documentation concerning discussions or correspondence with the U.S. Environmental Protection Agency or any other federal agency relating to potential or necessary approvals and permits required in connection with the PFS project
6. Any and all additional documents concerning discussions or correspondence with any federal or local agency, such as the U.S. Environmental Protection Agency, the U.S. Bureau of Land Management, the U.S. Fish and Wildlife, U.S. Bureau of Indian Affairs, Tooele County, relating to their participation or other interest in the Environmental Impact Statement being prepared by the NRC the PFS licensing action.
7. Any and all additional documents concerning discussions or correspondence the U.S. Bureau of Indian Affairs or any other federal or local agency, relating to the lease agreement between the Skull Valley Band of Goshutes and PFS.
8. Any and all additional documents concerning discussions or correspondence with any federal or local agency, such as the U.S. Bureau of Land Management, the U.S. Fish and Wildlife, U.S. Forest Service, State of Utah, relating to impacts to wildlife or plants in the Skull Valley.
9. Any and all additional documents concerning discussions, correspondence, or agreements with any federal or local agency, such as the U.S. Army, the U.S. Bureau of Land Management, the U.S. Fish and Wildlife, U.S. Bureau of Indian Affairs, U.S. Forest Service, Tooele County, relating to the coordination or their ability to provide emergency and law enforcement services.

In addition, we are unable to determine, from the documents PFS has provided, whether PFS intends to use or require the use of impact limiters on transportation casks after transfer to heavy haul trucks at the intermodal transfer point. The application itself is unclear and our review of PFS's documents has not yielded the information. It is also unclear whether, for nuclear plants without rail connections, impact limiters will be used on casks during heavy haul truck transport from the nuclear plant to the rail connection. Thus, please also provide any

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documents which discuss whether PFS intends to use or require the use of impact limiters throughout the process of transporting spent fuel from nuclear plants to the storage facility; and if they are not to be used throughout the transportation process, when they will not be used. If such documentation does not exist, provide an explanation in a letter.

After we have had a chance to carefully review the documents we have already obtained from you, we may make requests for the production of additional documents. If you have any questions, please contact me at 801-536-4231.

Sincerely,



Connie S. Nakahara

c: David Bird, Esq., Parsons Behle and Latimer
Denise Chancellor, Esq., State of Utah, Attorney General's Office
Diane Curran, Esq., Harmon, Curran, Spielberg & Eisenberg
Brian T. Allen, Esq., Parr Waddoups Brown Gee & Loveless
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