

June 16, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22
)	
(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

**APPLICANT'S RESPONSE TO OGD'S MOTION TO COMPEL APPLICANT
TO ANSWER INTERROGATORIES AND PRODUCE DOCUMENTS**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") files this response to "Intervenor Ohngo Gaudedah Devia's Motion to Compel Answers to Interrogatories and to Produce Documents Directed to the Applicant," ("Motion"). OGD served PFS with a single set of discovery requests on May 10, 1999,¹ to which PFS filed responses and objections on May 20, 1999.² On May 27, 1999 OGD filed the subject Motion without consulting with PFS before hand as required by Board Order.³ PFS advised OGD of this omission and OGD requested the Board to withhold action on the Motion until it had a chance to discuss its Motion with PFS.⁴ Following discussions with PFS, OGD filed a

¹ OGD's First Set of Discovery Requests Directed to the Applicant (May 10, 1999).

² Applicant's Objections and Responses to OGD's First Requests for Discovery (May 20, 1999) ("PFS's Objections").

³ Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 245 (1998). OGD also failed to comply with the Board's 10-page limit on motions. OGD filed its 15-page motion without prior approval of the Board, or consultation with PFS, to exceed the Board's 10-page limit. OGD attempted to request an extension to the Board's 10-page limit through a footnote in its filing, see Motion at 1 n.1, thus failing to comply with the Board's requirement that any request to exceed the page limits be filed at least three days prior to the filing and after consultation with other parties.

⁴ OGD's Motion to Hold In Abeyance (June 2, 1999).

letter with the Board identifying those issues raised in its Motion on which the parties were able to reach agreement and which no longer require Board action.⁵

OGD requests the Board to compel PFS to answer the remaining requests to which PFS has objected to as being beyond the scope of OGD's contention, as admitted by the Board.⁶ OGD argues in its Motion, among other things, that PFS's claims that the requests are beyond the scope of its contention are "glibly" made. Motion at 11. However, as discussed below, it is OGD that is impermissibly seeking to expand the scope of its contention and circumvent the clear limitations established by the Board in its admission of OGD O. Accordingly, OGD's Motion lacks merit and must be denied.

A. OGD O is Limited to Alleged Disparate Impact Caused by the PFS Facility

Pursuant to 10 C.F.R. § 2.740(b)(1), discovery is allowed into "any matter, not privileged, which is relevant to the subject matter involved in the proceeding." 10 C.F.R. § 2.740(b)(1). The information sought must be, as a minimum, "reasonably calculated" to lead to the discovery of admissible evidence. *Id.* (emphasis added). The scope of discovery is not, however, infinite, and it is well established that "the NRC Rules of Practice limit discovery to the boundaries of admitted contentions."⁷ These boundaries are defined by "the scope of a contention [which] is determined by the 'literal terms' of the

⁵ OGD Letter to Board Re: Portions of Motion No Longer Requiring Board Action (June 9, 1999). The issues withdrawn by OGD from its Motion concern Applicant's first and second general objection, OGD's Interrogatory No. 3 and Document Request No. 3, and OGD's request for PFS to refile its responses under oath from a PFS corporate official.

⁶ Also, OGD refuses to sign a confidentiality agreement substantially identical to that which the State has executed and requests the Board to require PFS to make available – without protection – the confidential portions of its lease with the Skull Valley Band. As discussed *infra*, OGD's request is devoid of any merit.

⁷ Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-25, 28 NRC 394, 396 (1988).

contention, coupled with its stated bases.”⁸ As stated in PFS’s Objections, OGD’s discovery requests are not relevant to its sole contention, OGD O, because they are beyond the literal terms of OGD O as admitted by the Board and are not reasonably calculated to lead to the discovery of admissible evidence.

In admitting contention OGD O, the Board expressly limited the contention “to the disparate impact matters outlined in bases one, five, and six.” LBP-98-7, 47 NRC at 233. The three specific bases admitted by the Board contest PFS’s assessment of impacts of the on the surrounding Native American community. Basis One alleges that the proposed Private Fuel Storage Facility (“PFSF”) “will have negative economic and sociological impacts on the Native community of Goshute Indians” in Skull Valley.⁹ Basis Five alleges that “PFS in its license application has failed to consider any of the [cumulative and] disproportionate impacts that may be suffered by the members of the Goshute Tribe” from the PFSF and other hazardous waste facilities in the vicinity, enumerated in Basis Five. Id. at 34. Basis Six alleges that “[t]he ER, fails to address the effect that the facility will have on the [value of] property that is owned by members of OGD or by people living in and around the area of the proposed ISFSI site.” Id. at 34-35. Thus, the three bases of OGD O admitted by the Board are limited to (as stated specifically by the Board with respect to Basis Six) “the effects of the PFS facility on . . . the Skull Valley Goshute community.” LBP-98-7, 47 NRC at 233 (emphasis added).

⁸ Id. (citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988)).

⁹ OGD’s Contentions Regarding the Materials License Application of Private Fuel Storage in an Independent Spent Fuel Storage Installation at 28 (Nov. 24, 1997) (“OGD’s Contentions”).

As set forth below, the disputed discovery goes beyond the limited bounds of OGD O as admitted by the Board. Thus, OGD's Motion to compel must be dismissed.¹⁰

B. OGD's Requests Are Beyond the Scope OGD O or Otherwise Lack Merit

OGD's Motion generally fails on two fundamental errors. First, OGD fails to link its requests to the text of its lone contention in this proceeding – OGD O – which is limited to the issue of “disparate impacts” as discussed above. Indeed, OGD requests general information on PFS and its member utilities solely on the basis that PFS is “the subject matter of this litigation,” with no attempt whatsoever to establish a link to OGD O. See Motion at 7, 11. Second, OGD fails to show how any of its objectionable requests are “reasonably calculated” to lead to admissible evidence as required by 10 C.F.R. § 2.740(b)(1). In fact, OGD fails to address this standard and relies wholly instead on broad unsupported assertions that the requested discovery “could assist OGD in evaluating the impacts,” “could lead to information regarding the safety and impacts,” “may assist OGD in learning more,” and similar such generalized assertions. Motion at 8 and 14. Such broad unsupported assertions are an insufficient basis to compel discovery.¹¹

In Interrogatory No. 4, OGD requests PFS to provide detailed information concerning “each person, organization, and/or entity that has a substantial interest in PFS” so that OGD can “fully understand who controls and makes decisions for PFS.” Motion at

¹⁰ The Board has recently affirmed that OGD's discovery is limited to obtaining information relevant OGD O. See Memorandum Ruling on Motions to Extend Discovery and to Quash Deposition (June 14, 1999).

¹¹ See, e.g., Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489, 492 (1977) (“practical consideration[s] dictate that the parties should not be permitted to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.”) (quoting Broadway & Ninety-Sixth St. Realty Co. v. Loew's Inc., 21 F.R.D. 347, 352 (S.D.N.Y. 1958))).

7. OGD argues that this request "is entirely relevant" because "the subject matter of this litigation is about PFS and its application to license a dangerous facility." Id. However, OGD makes no attempt whatsoever to demonstrate how information on "who controls and makes decisions for PFS" relates to alleged disparate impacts caused by the PFSF, or how the request is "reasonably calculated" to lead to admissible evidence concerning such impacts. Thus, as to this request, OGD's Motion must be denied.

In Interrogatory No. 5, OGD requests detailed information concerning "each nuclear power facility that may provide waste to be stored at the proposed PFS facility," including "whether the facility currently stores and/or has room to store the type of wastes planned for storage at the proposed [PFSF]." Id. at 8. This request relates directly to Basis Four of OGD O, regarding at-reactor spent fuel storage capacity, which the Board rejected.¹² The Board should not allow OGD to slip through the back door that which the Board has previously barred at the front. OGD argues that "[w]hether these facilities presently have spent fuel storage capacity . . . may allow OGD to seek further information concerning the impacts from storage on those communities," and that this "could assist OGD in evaluating the impacts its community may suffer if the PFS facility is licensed and the disproportionate nature of those impacts." Id. Clearly, this argument is a post-hoc rationalization for the request itself makes no reference to impacts of spent fuel storage. Moreover, even assuming some tenuous relevance, the request falls in the "shadow zones of relevancy," see note 11, supra, and does not meet the requirement that

¹² LBP-98-7, 47 NRC at 233. Basis Four challenged PFS's assertions in the ER that the "unavailability of added storage has become a significant risk" that could "cause the shutdown" of reactors. OGD Contentions at 31.

discovery be “reasonably calculated” to lead to admissible evidence. Indeed, OGD makes no such claims, much less provide support for such a claim.¹³

Similarly, OGD’s claim that Interrogatory 5 is “also relevant” because it “may lead to the discovery of information” concerning: (1) why certain utilities have made different choices for spent fuel storage, (2) whether utilities considered safety and health issues, and (3) whether utilities considered environmental issues, Motion at 8-9, is likewise without merit. OGD makes no showing – even assuming such information were forthcoming in subsequent discovery – that the information is relevant or would be admissible concerning alleged disparate impacts of the PFSF on the Goshute community.

Finally, OGD’s claim that this interrogatory is relevant to “mitigation strategies and attention to alternatives,” *id.* at 9, is likewise misplaced. Alternatives are beyond the scope of OGD O as admitted by the Board, focused as it is on asserted disparate impacts of the PFSF on the Skull Valley Goshute community, and OGD fails to show how the information requested would in any way relate to or provide admissible evidence concerning mitigation strategies. Simply put, for all its new explanations, OGD has failed to demonstrate that Interrogatory No. 5 is within the scope of OGD O concerning alleged disparate impacts caused by the PFSF or reasonably calculated to lead to admissible evidence of such. Thus, OGD’s Motion must be denied as to this request.

In Document Request No. 4, OGD requests detailed information concerning the formation and operation of both PFS and “companies involved in the formation and/or operation of PFS,” including annual reports, business licenses and permits, public utility

¹³ OGD’s bald assertions that such information “may allow” or “could assist” OGD in certain respects certainly do not provide such a showing.

commission filings, and Securities and Exchange Commission filings. Motion at 10. OGD makes no attempt to show how such corporate financial information is related to alleged disparate impacts of the PFSF on the Skull Valley Goshute community, but simply asserts that such information “is relevant to the basic subject matter of the litigation,” which OGD claims is “PFS and the persons or organizations that control PFS.” Id. at 10-11. This bald request must be rejected, even if such information is of interest to OGD, for it is clearly outside the scope of OGD O and not subject to discovery by OGD here.

OGD’s arguments concerning Document Request No. 5, which requests “all articles of incorporation, by-laws, and partnership agreements that pertain to the PFS L.L.C.,” id. at 11, are similarly deficient. Again, rather than explaining how this information is within the scope of the disparate impacts asserted in OGD O, OGD attempts to justify its request solely on the basis that “PFS is the subject of this litigation” and that the information requested is just “basic foundational information.”¹⁴ Id. The subject of “this litigation” for OGD, however, is not “PFS,” but rather OGD O as admitted by the Board. Because OGD makes no attempt to show how information of PFS’s corporate structure is related to OGD O, the Motion must be denied with respect to this request.

In Document Request No. 7, OGD requests information concerning PFS’s lease agreement with the Skull Valley Band of Goshutes (“the Band”), as well as any related payments of funds or services provided by PFS to the Band. See Motion at 11-13. In re-

¹⁴ OGD also mentions in passing that PFS “is not claiming the requested documents are privileged or . . . confidential.” Id. at 11. Of course, the limits on the scope of discovery are unrelated to restrictions based on claims of privilege and confidentiality. Even if these documents were relevant and within scope, some of them include PFS confidential information and would be made available to OGD only subject to a confidentiality agreement (see discussion infra) or a protective order.

sponse to this document request, PFS informed OGD that the lease agreement and other relevant documents had already been produced by PFS at its document repository at Parsons Behle and Latimer in Salt Lake City and that PFS confidential documents, including the lease, were available for OGD's review "for purposes of this proceeding upon executing an appropriate confidentiality agreement." PFS Objections at 8. PFS had previously apprised OGD during informal discovery that confidential portions of the lease relevant to OGD O were available for OGD's review subject to execution of a confidentiality agreement,¹⁵ and subsequently – at OGD's request – provided OGD a draft confidentiality agreement to review and execute.¹⁶ In fact, other parties (the State and the NRC Staff) have already obtained access to confidential portions of the PFS lease agreement upon agreeing to maintain its confidentiality.¹⁷

OGD protests PFS's request that OGD sign a confidentiality agreement,¹⁸ and argues that "the final lease [agreement] must be released without condition to OGD" because PFS has failed to articulate a basis for holding the lease agreement confidential. Id. at 12 (emphasis added). OGD fails to identify any support in the Commission's regula-

¹⁵ See November 24, 1998 letter from P. Gaukler (PFS) to J. Walker (OGD), attached as Exhibit 1.

¹⁶ A copy of the January 11, 1999 letter from P. Gaukler (PFS) to J. Walker (OGD) forwarding the draft confidentiality agreement is attached as Exhibit 2.

¹⁷ The State received relevant portions of the confidential lease agreement after signing a confidentiality agreement essentially identical to offered to OGD. The NRC Staff received the same subject to agreement to hold it confidential pursuant to 10 C.F.R. § 2.790. See Exhibit 3, Affidavit of John Parkyn (requesting NRC to withhold "the business lease between PFS and the Skull Valley Band" (id. at 3) and other PFS confidential business information provided to NRC Staff). Mr. Parkyn's affidavit sets forth the bases why portions of the lease (and the other documents provided the Staff) constitute PFS sensitive confidential and proprietary information and should be withheld from disclosure under 10 C.F.R. § 2.790.

¹⁸ OGD also complains loudly that "OGD, which is almost entirely comprised of members of the Skull Valley Band of Goshutes, has yet to see an unredacted copy of the final lease or other benefits conferred or promised to the Band." Motion at 13. It is unclear what relevance OGD intends this non-legal assertion to have on the Board with regard to PFS' discovery response.

tions or case law for its assertion that PFS "must" release its confidential information "without condition" to OGD. Moreover, OGD has always known that PFS has claimed that portions of the lease contain confidential business information, see Exhibit 1 at 3, and was well aware of the basis of the confidentiality claimed by PFS. Indeed, the Bureau of Indian Affairs ("BIA") has determined that the lease contains confidential commercial and financial information that is not subject to disclosure under the Freedom of Information Act ("FOIA"), a determination which OGD's Chair has challenged in a Federal suit against the Department of Interior.¹⁹ OGD's request appears to be nothing more than an attempt to obtain through another avenue an unrestricted copy of the PFS lease agreement which was denied to it by another federal agency and is the subject of a Federal district court lawsuit. The Board should reject OGD's attempt to subvert this legal process as well as the finding of the responsible federal agency, BIA, that the PFS lease agreement contains confidential commercial and financial information.²⁰

In Document Requests Nos. 8 and 9, OGD requests information on "any funding" or "any federal financial assistance" "provided to [each nuclear power facility that may ship spent fuel to the PFSF] and/or the facility's owner and/or operator by the NRC

¹⁹ See United State ex rel. Blackbear and Bullcreek v. Babbitt, No. 2:99CV 0156K at 38-42 (C.D. Utah Mar. 10, 1999) (complaint). A copy of sections of the complaint requesting release of the lease under the FOIA is attached as Exhibit 4. The above suit has been combined with a lawsuit brought by the State also seeking release of the lease under FOIA. See State of Utah v. U.S. Department of the Interior, Case No. 2:98-CV-380K. PFS notes that the State, although challenging BIA's determination in a federal lawsuit, that portions of the lease are confidential, has for purposes of this proceeding executed a confidentiality agreement in order to review confidential portions of the lease. This would seem to be the reasonable course for OGD to follow as well, for there is no need to embroil this Board in the confidentiality issue that is currently being litigated in another forum.

²⁰ To the extent OGD continues to refuse to execute a confidentiality agreement for purposes of this proceeding, PFS notes that the Commission's regulations allow for a protective order to protect such confidential information. See 10 C.F.R. 2.740(c)(6). Such a protective order could follow the terms of the confidentiality agreement in Exhibit 2, which were developed cooperatively between PFS and the State.

and/or any other governmental agency.” Motion at 13. Because these two requests seek information concerning “any [Federal] funding” or “financial assurance,” regardless of whether it relates in any way to the PFSF or even to spent fuel storage, id., they are both clearly far afield of OGD O, and the Board must dismiss these requests. Document Request No. 10 – which requests information regarding Federal funding and non-monetary assistance provided to PFS related to identifying the Skull Valley site – is similarly outside the scope of Contention OGD O.

OGD argues that these requests are relevant because “[a]gencies sometimes fund certain industry activities in order to learn more about health and safety issues or to ensure improvement in health and safety protections,” and therefore “receiving information about funds provided by government agencies could lead to information regarding the safety and impacts high level nuclear spent fuel storage [sic].” Id. at 14. This speculation wholly devoid of any basis in fact fails to demonstrate that information regarding such alleged Federal financial assistance meets the “reasonably calculated” standard for discovery of information regarding disparate impacts of a storage facility on the Skull Valley Goshute reservation.

For the foregoing reasons, OGD’s Motion to Compel should be dismissed.

Respectfully submitted,



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Dated: June 16, 1999

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Response to OGD's Motion to Compel Applicant to Answer Interrogatories and Produce Documents were served on the persons listed below (unless otherwise noted) by e-mail, except for Exhibit 4 which has been served by facsimile, with conforming copies by U.S. mail, first class, postage pre-paid, this 16th day of June 1999.

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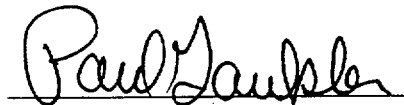
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