

May 7, 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 STATE OF UTAH'S PROPRIETARY AND
NON-PROPRIETARY MOTIONS TO COMPEL APPLICANT TO RESPOND TO
STATE'S FIRST SET OF DISCOVERY REQUESTS**

I. INTRODUCTION

Applicant Private Fuel Storage L.L.C. ("PFS") files this response¹ to the "State of Utah's Motion to Compel Applicant to Respond to State's First Set of Discovery Requests" ("State's Motion") regarding Utah C and to the "State of Utah's Proprietary Motion to Compel Applicant to Respond to State's First Set of Discovery Requests Regarding Contention H" ("State's Proprietary Motion") (collectively, "Motions"). In these Motions, the State claims that PFS offers "specious," and "absurd and audacious" justifications for its refusal to answer the State's discovery requests. State's Motion at 5; State's Proprietary Motion at 4. However, as discussed below, it is the State which impermissibly seeks to expand the scope of the admitted contentions and circumvent the clear limitations established by the Board in its original ruling on the admissibility of contentions.² Thus, the Motions should be denied.

¹ Because many portions of the Motions are duplicative, PFS has chosen to combine its response to the Motions.

² Private Fuel Storage L.L.C. (Private Fuel Storage Facility), LBP-98-7, 47 NRC 142 (1998).

II. THE MOTION TO COMPEL DISCOVERY FOR UTAH C LACKS MERIT

A. The Discovery Sought by the State is Beyond the Scope of the Contention

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." The scope of discovery is not, however, infinite,³ and it is well established that "the NRC Rules of Practice limit discovery to the boundaries of admitted contentions."⁴ These boundaries are defined by "the scope of a contention [which] is determined by the 'literal terms' of the contention, coupled with its stated bases."⁵ As stated in PFS's Objections, the State's discovery requests for Utah C are not relevant because they are beyond the literal terms of the contention as admitted.

In Utah Contention C, the Board limited the State's contention regarding PFS's dose analysis to three specific bases: (1) the "selective and inappropriate use of data from NUREG-1536", (2) the "selective and inappropriate use of data from SAND80-2124", and (3) PFS's failure to consider radiation pathways other than inhalation of a passing cloud. PFSF, LBP-98-7, 47 NRC at 185. As part of the ongoing licensing process, PFS has, however, submitted a revised radiation dose analysis following the latest guidance from the Office of Spent Fuel on dose analysis for ISFSIs, ISG 5. This revised analysis

³ See, e.g., Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489, 492 (1977) ("practical consideration 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)).

⁴ Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-25, 28 NRC 394, 396 (1988).

⁵ Id. (emphasis added) (citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988)).

directly addresses and effectively moots Contention C.⁶ Specifically, PFS's revised dose analysis uses no data from NUREG-1536 or SAND80-2124, thereby mooting the concerns raised by the State in Subparts 1 and 2 of Utah C. Hennessy Aff. at ¶¶ 6 and 7. Further, the revised dose analysis includes exposure from other applicable pathways in addition to inhalation from a passing cloud, as urged by the State in Subpart 3 of Utah C, such as direct radiation and ingestion of food and soil. Id. at ¶ 8.

Thus, the Applicant has directly addressed the concerns raised by the State and the State in effect has won the contention as admitted by the Board. But apparently unsatisfied with its successful effort, the State seeks to go beyond the bounds of original contention as admitted by the Board. PFS objected, and correctly so, to the relevance of each request on the grounds that Contention C was limited to PFS's use of data from the referenced reports and to the alleged failure to consider other exposure pathways, and that none of the discovery was directed to these issues.

Remarkably, the State claims that PFS's revised analysis, which makes no use of the two reports referenced in Utah C – NUREG-1536 and SAND80-2124 – is somehow relevant to its contention that data from these reports was used inappropriately. The State has offered no evidence that data from these reports was even used in the revised dose analysis, much less that the data was used inappropriately. Indeed, the State acknowledges that PFS's revised analysis uses "an alternative method, suggested by the Staff in a recent guidance document, which does not rely on NUREG-1536 and

⁶ See Applicant's Motion for Summary Disposition of Utah Contention C – Failure to Demonstrate Compliance with NRC Dose Limits, dated April 21, 1999 and the accompanying Affidavit of William Hennessy.

SAND80-2124.”⁷ State’s Motion at 5. The State, nevertheless, claims its requests are relevant because they seek information regarding how PFS is “compensating for or altering its reliance on NUREG-1536 and SAND80-2124.” State’s Motion at 5. This argument is devoid of merit for there is no longer any reliance whatsoever by PFS on the data from these reports.⁸ The revised analysis done pursuant to the Staff’s new guidance supersedes the analysis set forth in the License Application, as discussed below. Because the State has not – and cannot – point to any reference or reliance to NUREG-1536 and SAND80-2124 in PFS’s revised analysis, direct, indirect, implicit, or otherwise, the State’s requests are simply a fishing expedition beyond the scope of the contention, clearly not allowed under the Commission’s rules of practice.

Similarly, the State claims that requests concerning the results and methodologies of PFS’s analysis of additional dose pathways can somehow lead to evidence that PFS never performed this same analysis also lacks merit. In Interrogatory No. 2, the State explicitly acknowledges that PFS considered at least three exposure pathways other than inhalation of the passing cloud. State of Utah’s First Set of Discovery Requests at 18. In fact, in Interrogatory No. 5, the State effectively admits that PFS considered additional pathways, stating “[t]he standard RESRAD code is then employed to calculate direct gamma, food ingestion and inhalation of resuspended particulates.” Id. at 19 The State’s

⁷ The State has the temerity to suggest that this new “guidance document was issued specifically for the purpose of giving PFS a way to get around the issues raised by subparts 1 and 2 of Contention C.” State’s Motion at 5. This bald allegation incriminating the integrity of the Staff and the licensing process is wholly unsupported and unwarranted.

⁸ PFS has identified no credible accident scenario that would result in the release of radiation, as stated in PFS SAR §8.2, and has therefore performed accident dose calculations based on non-mechanistic postulated accidents in accordance with the Staff’s licensing guidance. The revised dose analysis in the RAI responses, which relies on neither NUREG-1536 or SAND80-2124, follows the latest Staff guidance and supersedes that in the License Application, which was based on previous Staff guidance.

own interrogatories belie the self-contradictory fact that the State seeks to compel the production of information which, by the literal terms of its contention, does not exist.

Having failed to show any relevancy to its contention as admitted, the State argues that the licensing proceeding must focus exclusively upon the license application⁹ and ignore PFS's responses to the Staff's Requests for Additional Information ("RAIs") because they are "mere correspondence" between the Applicant and the Staff. State's Motion at 7. The State's argument places form over substance. PFS's answers are not "mere correspondence," but represent analysis, information, and commitments provided by PFS in response to formal Commission inquiries. Under 10 C.F.R. § 72.11, all licensees and applicants are required to provide the Commission with complete and accurate information, and responses to RAIs certainly must comply with these requirements. Because of this duty, PFS plainly cannot ignore the positions and commitments set forth in its RAI responses as suggested by the State. Rather, as PFS stated in response to the State's General Request for Admissions No. 1, the "commitments, representations, and statements made by the Applicant in response to the NRC Staff [RAIs] have the same effect as commitments, representations and statements

⁹ The State supports its argument with the language of 10 C.F.R. § 2.714(b)(2)(iii), which requires potential intervenors to reference "specific portions of the application." This argument mischaracterizes the purpose of 10 C.F.R. § 2.714 and the effect of the commitments contained in an applicant's answers to RAIs, which effectively amend the application, as discussed in the above text. When the Commission amended §2.714 to require that petitioners reference "specific portions of the application. . . that the petitioner disputes," its intent was to ensure that potential intervenors at least "read the portions of the application . . . that addresses the issues that are of concern to it and demonstrate that a dispute exists between it and the applicant on a material issue of fact or law." 54 FR 33168, 33171. This additional requirement for the admissibility of a contention was not meant to change the focus of the licensing proceeding but merely to require a petitioner to identify the nexus of its contention with the specifics of the contested application, which makes particular sense at the notice of opportunity stage of a proceeding when other licensing documents have generally not been generated.

made by the Applicant in its ISFSI Part 72 License Application."¹⁰ Moreover, as further stated by Applicant in its response to the State's General Request for Admissions No. 2, the "commitments, representations, and statements made by the Applicant in response to the NRC Staff [RAIs] effectively amend the commitments, representations, and statements made by the Applicant in its ISFSI Part 72 License Application."¹¹

This effect of RAIs is well established NRC practice, as the State, which is represented by experienced NRC counsel, must know. Amendments to the license are made to conform the license to the commitments made by an applicant in the RAI process. However, such amendments are essentially administrative in nature to ensure that the application accurately represents the design and analysis as committed to the NRC in the RAI responses.¹² Thus, the State's attempt to hinge its discovery on those portions of the License Application that have been superseded by new analysis and commitments provided in the RAI response must be rejected.

Moreover, the State's claim that it would be "unfair and prejudicial" to uphold PFS's objection is irrelevant. State's Motion at 7. The determination of a discovery request's relevance does not turn on how the decision would affect a party's ability to file additional contentions. Nevertheless, the State has not been treated unfairly or prejudicially here. The State does not dispute that it was on the service list for the RAI responses and that it had received the revised dose calculations by mid-February. Thus,

¹⁰ Applicant's Objections and Non-Proprietary Responses to State's First Request for Discovery, at 3 dated April 21, 1999 ("Objections").

¹¹ Id.

¹² PFS intends to file a license amendment on or about May 14, 1999 which will formally incorporate into the License Application the various analyses and commitments that it has made in its RAI responses filed in February, and subsequent commitments made by PFS in the course of the Staff's review of its application.

the State could have filed new or amended contentions based on the revised calculations any time during these past two months. "Indeed, one reason for having a generic late-filed contention provision in the regulations is to have a logical, prenoticed method for intervenors to raise concerns in proceedings that relate to newly developed information,"¹³ such as an applicant's response to an RAI.

In short, the State's motion to compel discovery with respect to Utah C must be rejected as being beyond the scope of the contention.

B. The State's Discovery Requests Concerning Nuclear Sabotage Are Also Beyond the Scope of the Contention.

PFS also objected to the relevance of Requests for Admission 8-11 and Interrogatory 9 with respect to Utah C on the grounds that they related to nuclear sabotage, an area that the Board excluded from Contention C. In its original contention, the State claimed that the non-mechanistic postulated breach of the canister underlying the original dose calculation was a credible result of a transportation-related sabotage event. The Board rejected this claim, holding in part that it lacked adequate factual and expert opinion support, and impermissibly challenged the Commission's regulations.¹⁴

In its motion to compel, the State tries to sneak through the backdoor subject matter that has already been rejected at the front door. The State claims that its requests merely seek "information about PFS's assumptions regarding the nature of the accident that is evaluated." State's Motion at 8. A cursory reading of the actual requests shows

¹³ Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 350 (1998).

¹⁴ 47 NRC at 186.

the disingenuous nature of this characterization.¹⁵ These requests in no way concern PFS's "selective and inappropriate use of data" but instead ask PFS to comment on the effects of TOW-2 and MILAN anti-tank missiles on a storage cask.¹⁶ This Board should not allow the State's renewed attempt to gain admittance for subject matters previously deemed outside the proceeding's scope.

III. THE MOTION TO COMPEL DISCOVERY FOR UTAH H LACKS MERIT

As with Utah Contention C, the discovery sought by the State with respect to Utah H is beyond the scope of the contention. In its Objections, PFS assumed, and the State's Proprietary Motion confirms, that the State's discovery requests for Contention H are based on subparts 3, 4 and 5 of the contention. These subparts focus on PFS's alleged failure to consider various second order thermal effects (such as solar heating of the concrete pad, radiant heating by adjacent casks, and the impact of heating of the concrete pad on convection cooling) in its thermal analysis of the storage casks. In response to the NRC Staff's RAI 4-2,¹⁷ PFS supplied a revised Holtec thermal calculation for the HI-STORM 100 cask system based on an expanded thermal model which takes into account these second order thermal effects urged by the State in subparts 3, 4 and 5, and found their impacts, as expected, to be small.

The discovery sought by the State is clearly beyond the "literal terms" of Utah H, subparts 3, 4 and 5, which limit their scope to PFS's failure to consider the specific

¹⁵ PFS notes that if the State is truly interested in the nature of the accident evaluated, its entire analysis is based on ISG5.

¹⁶ See, e.g., State's First Discovery Request at 17 ("REQUEST NO. 8. Do you admit that a TOW-2 anti-tank missile can penetrate one meter of steel, and therefore could penetrate a HI-STAR 100 metal cask?").

¹⁷ "Safety RAI No. 2 Responses," submitted under letter from John D. Parkyn, Chairman, Private Fuel Storage, to Director, Office of Nuclear Material Safety and Safeguards, USNRC (Feb. 10, 1999).

thermal effects mentioned therein.¹⁸ The State seeks far ranging discovery into the basis and results of calculations (computer models, codes, etc.) supposedly to support a claim that those exact calculations were never performed. In its motion to compel, the State argues that such discovery is necessary for it to assess whether PFS has accounted for the thermal effects referenced in subparts 3, 4, and 5, and that without such discovery, "the model is a black box." State Prop. Mot. at 5. Contrary to the State's claim, the model is not merely a black box. The RAI response identifies the methodology used to incorporate the second order thermal effects as part of Holtec's thermal evaluation of the cask. Further, the thermo-physical elements and parameters of the model are identified in detail in the proprietary Holtec Calculation Package, which has been provided to the State under a confidentiality agreement. These documents set forth the pertinent information which would enable the State to verify the factors and phenomena incorporated into the revised model.¹⁹

Nevertheless, without waiving its objections, PFS will answer the State's interrogatories with respect to Utah H in which the State raises specific questions about the methodology that Holtec used to account for the thermal effects referenced in Subparts 3, 4, and 5. Applicant will provide these answers by next Friday, May 14, 1999. Applicant, however, will not coincidentally be responding to the State's burdensome document requests but continues to object to these overly broad and irrelevant requests.

¹⁸ See 42 NRC at 189. Utah Contention H, Basis 3 ("failed to take into account"); Utah Contention H, Basis 4 ("fails to take into consideration"); Utah Contention H, Basis 5 ("fails to account for").

¹⁹ These documents will be attached to Applicant's partial motion for summary disposition with respect to Utah H which should shortly be filed with the Board. Although Applicant had intended to have the motion on file by this time, work on other matters, such as preparing for depositions, other written discovery, and other motions for summary disposition, has delayed the filing of Applicant's motion with respect to Utah H.

There is, for example, simply no basis for the State's claimed need to obtain "all documents referring or relating in any way to thermal design of the . . . Holtec Hi-Storm cask" or the Fluent users manual, computer software and source code used by Holtec for the thermal modeling of its cask systems.²⁰ See Applicant's Objections and Proprietary Responses to State's First Requests for Discovery at 6. Such a request is overly broad, violates the Board's clear instruction that the scope of the contention is limited to site specific issues,²¹ and must be rejected.

IV. CONCLUSION

For the foregoing reasons, the State's Motions to Compel should be dismissed.

Respectfully submitted,



Jay E. Silberg
Ernest L. Blake, Jr.
Paul A. Gaukler
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, DC 20037
(202) 663-8000
Counsel for Private Fuel Storage L.L.C.

Dated: May 7, 1999

²⁰ Moreover, Holtec has informed counsel for Applicant that Holtec is granted a license by Fluent Inc. for in-house usage only of the Fluent Code on a single designated and controlled computer and that the Code is not capable of being copied by Holtec to use on other computers either within or without Holtec. Thus, the program and code are not physically produceable by Holtec.

²¹ Memorandum and Order of May 18, 1998 Ruling on Motions for Reconsideration, Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 295 (1998). See also LBP-98-7, 47 NRC at 185-86 ("Commission's regulatory scheme . . . establish[es] a separate cask design approval process under rulemaking procedures"). As noted in Applicant's objections, it is obvious from the broad nature of the requests that the State is seeking information in this proceeding to use generally in the Holtec cask certification rulemakings before the Commission, in which at least one docket, the State has filed comments opposing certification on thermal design issues.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Response to State of Utah's Proprietary and Non-Proprietary Motions to Compel Applicant to Respond to State's First Set of Discovery Requests were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 7th day of May 1999.

G. Paul Bollwerk III, Esq., Chairman
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: GPB@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: JRK2@nrc.gov

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: PSL@nrc.gov

* Susan F. Shankman
Deputy Director, Licensing & Inspection
Directorate, Spent Fuel Project Office
Office of Nuclear Material Safety &
Safeguards
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications
Staff
e-mail: hearingdocket@nrc.gov
(Original and two copies)

Catherine L. Marco, Esq.
Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: pfscase@nrc.gov

John Paul Kennedy, Sr., Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
1385 Yale Avenue
Salt Lake City, Utah 84105
e-mail: john@kennedys.org

Diane Curran, Esq.
Harmon, Curran, Spielberg &
Eisenberg, L.L.P.
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
e-mail: DCurran.HCSE@zzapp.org

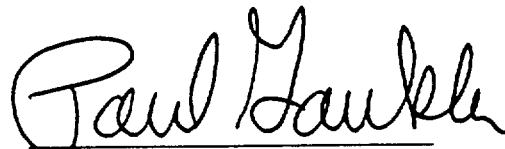
* Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancel@state.UT.US

Joro Walker, Esq.
Land and Water Fund of the Rockies
165 South Main, Suite 1
Salt Lake City, UT 84111
e-mail: joro61@inconnect.com

Danny Quintana, Esq.
Skull Valley Band of Goshute Indians
Danny Quintana & Associates, P.C.
50 West Broadway, Fourth Floor
Salt Lake City, Utah 84101
e-mail: quintana@xmission.com

* By U.S. mail only


Paul A. Gaukler