April 22, 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)	)	

APPLICANT'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND ADMISSIONS BY THE STATE OF UTAH

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") files this motion to compel the State of Utah ("State" or "Utah") to answer interrogatories pursuant to 10 C.F.R. § 2.740(f)(1) and to have matters that were the subject of requests for admission to be deemed admitted pursuant to 10 C.F.R. § 2.742. PFS files this motion after receiving responses to its First Set of Formal Discovery Requests[1] from the State that were evasive and incomplete. PFS's requests had sought the State to either admit that certain matters, primarily related to the potential impact of other facilities and flooding on the Private Fuel Storage Facility ("PFSF"), were not really at issue, or to identify with specificity the technical basis for its claims. The State did neither and PFS therefore files this motion.

[1] Applicant's First Set of Formal Discovery Requests to Intervenors State of Utah and Confederated Tribes, dated April 2, 1999 [hereinafter PFS 1st Req.]; State of Utah's Responses and Objections to Applicant's First Set of Formal Discovery Requests, dated April 14, 1999, but served electronically April 15 [hereinafter Utah Resp.]. The Applicant files this motion within seven days after electronic receipt of the State's response, pursuant to the Board's Order of August 20, 1998. Memorandum and Order (Additional General Schedule Guidance and Informal Discovery Status Conference Schedule) at 4.

I. STATEMENT OF THE ISSUES

On April 2, 1999, the Applicant served the State with its first formal discovery request. PFS 1st Req. On April 15, the State served the Applicant with its response. Utah Resp. After resolving some disagreements with the State,[2] the Applicant believes that the State's response remains deficient in two principal ways.

First, in response to many of PFS's interrogatories, the State did not provide PFS with the information it currently possesses, but stated that, because it was still collecting information, it would provide all its information in a supplemental response at a later date. See Utah Resp. at 19-20, 37-41, 47-49. Second, and in a similar vein, in response to many of PFS's requests for admission, the State did not squarely admit or deny the matter, but instead denied it "on information and belief," stating, without further explanation, that it presently lacks sufficient information to admit or deny the matter. Id. at 2-3, 21-25, 27-34, 45-46, 58-60. Pursuant to 10 C.F.R. § 2.740(f)(1), the Applicant moves to compel the State to answer the interrogatories directly and completely. Pursuant to 10 C.F.R. § 2.742(b), the Applicant requests the Board to deem admitted the matters that were the subjects of requests for admission that the State did not squarely admit or deny.

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[2] Pursuant to the Atomic Safety and Licensing Board's ("Licensing Board" or "Board") direction, the Applicant made an effort to resolve its dispute with the State informally. That effort was partially successful. The State agreed to file oaths for each person answering specific interrogatories and requests for admissions. (As noted in Applicant's response to the State's discovery requests, the Applicant will shortly do likewise with respect to its answers filed yesterday.) The State agreed to name its witnesses for Group I contentions, other than Utah K, and to provide the information related to them, on the condition that PFS would not depose the State's witnesses, other than knowledgeable State personnel for Utah K, until the latter half of May. The State also agreed to reply substantively to the Applicant's requests for admissions to which the State had originally replied, "the document speaks for itself." Those matters on which the parties could not agree are the subject of this motion.

II. ARGUMENT

It is imperative that the State answer the Applicant's discovery requests directly, completely and in a timely manner. "[T]he failure to fulfill discovery obligations [not only] unnecessarily delay[s] a proceeding, it is also manifestly unfair to the other parties." Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1417 (1982).

> The Applicants in particular carry an unrelieved burden of proof in Commission proceedings. Unless they can effectively inquire into the positions of the intervenors, discharging that burden may be impossible. To permit a party to make skeletal contentions, keep the bases for them secret, then require its adversaries to meet any conceivable thrust at hearing would be patently unfair, and inconsistent with a sound record.

Id. (quoting Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 338 (1980)).

A. The State Must Provide Complete Answers to the Applicant's Interrogatories

The State's responses to interrogatories concerning Contentions Utah K (Nos. 1-7) and Utah M (Nos. 1-6) were evasive, incomplete and woefully deficient[3] and the Applicant moves to compel complete answers thereto.

1. Contention Utah K (Credible Accidents)

With respect to Contention Utah K (Credible Accidents), the Applicant filed interrogatories requesting the State to identify (to the extent it did not admit to a lack of hazards from nearby facilities) (1) the specific activities or materials emanating from the fa-

[3] See PFS 1st Req. at 11-12, 15-16; Utah Resp. at 19-20, 34-41, 47-49

cilities which the State claimed posed a significant hazard to the PFSF or the ITP,[4] (2) the technical bases on which the State claimed such to constitute a significant hazard, and (3) accidents that had occurred historically which the State claims would have posed a significant hazard had the PFSF or ITP been constructed or operating. The purpose of these interrogatories was to flush out the specific technical hazards to the PFSF or ITP claimed by the State – as distinguished from its broad amorphous concerns expressed in Utah K – and to elicit the specific factual and technical bases for the State's allegations in order to sharply define the issues for litigation.

The State's responses are woefully inadequate, particularly at this stage of the proceeding – almost 18 months after the filing of the contentions. The State cites only lists of generic categories of hypothetical hazards, but produces no information or data specific to the facilities and activities that the State asserts would threaten the ISFSI. See Utah Resp. at 34-40 (Interrogatory Nos. 1-3, and 6). It is one thing to raise such broad, hypothetical concerns at the contention stage, but it is insupportable at this stage of the proceeding, little more than a month before the close of formal discovery.

It is clear under Commission precedent that the State's evasive and incomplete responses are deficient. Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 583 (1975) (interrogatory answers "must be complete, explicit and responsive"); 10 C.F.R. § 2.740(f)(1) ("[a]n evasive or incomplete answer or

[4] PFS defined "significant hazard" to mean that "the potential impact of the activity or material on the PFS ISFSI . . . would be a licensing issue with respect to the PFS ISFSI." PFS 1st Req. at 7.

response shall be treated as a failure to answer or respond"). As stated by the Pilgrim board:

> [An intervenor] has a responsibility to specify the facts, i.e., the data, information and documents, if any, upon which he intends to rely and upon which he has relied in support of his intervention, so that parties may be advised in advance with regard to the nature of the Intervenor's case.

Pilgrim, LBP-75-30, 1 NRC at 586 (emphasis added).[5] Thus, the State's recital of generic, hypothetical alleged hazards is insufficient. The State must provide the specific facts, data, and information, if any, it has concerning the asserted hazards to the ISFSI.

The State argues, however, that it "is not in a position to fully respond to [the] Interrogator[ies] because it is still investigating and analyzing [the relevant matters]."[6] The State's arguments provide no justification for ignoring the interrogatories. It should provide any information it has now and, if later further investigation and analyses so dictates, it may have to supplement its answer.

> [L]ack of complete or partial knowledge does not excuse failure to make timely answers to interrogatories. In the absence of such knowledge, the party . . . must answer to the best of his ability . . . ; if he claims to have less than full information at the time his answers are due, he should answer by giving the available information and by stating that the answer reflects the limited information that he then has.

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[5] See, e.g., Duke Power Company (Catawba Nuclear Station, Units 1 and 2), LBP-83-29A, 17 NRC 1121, 1124 (1983) (response concerning quality assurance contention should "state the nature of the problem, where in the plant it was found, when it occurred and who was involved"); id. at 1125 (welding response should give "names, places, dates, etc."); id. at 1127-28 (responses must specifically define contention terms, such as "sufficient").

[6] See Utah Resp. at 37-41 (Interrogatory Nos. 3-7); see also id. at 19-20 ("Qualifications to Responses to Contention K").

Pilgrim, LBP-75-30, 1 NRC at 583 n.10; Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 498-99 (1983).

Finally, the State's claims that PFS's interrogatories asking for the technical bases for the State's answers to PFS's other interrogatories are over broad[7] are equally groundless. "To the extent the interrogatory seeks to uncover and examine the foundation upon which an answer to a specific interrogatory is based, it is proper, particularly where . . . it relates to the interogee's own contention." Seabrook, LBP-83-17, 17 NRC at 493.[8] Hence, as the interrogatories in question merely seek the bases for the State's own answers to other interrogatories, the State's claims of over breadth carry no weight.

Therefore, PFS requests that the Board order the State to provide direct, complete, and specific answers to PFS's Interrogatories Nos. 1-7 for Utah K on the basis of the information the State has now.

2. Contention Utah M (Probable Maximum Flood)

The Applicant filed interrogatories for Contention Utah M to elicit the precise bases for the State's claims. The State objected that it could not respond to Interrogatory Nos. 1-6 because it was reevaluating the Applicant's use of a parameter to calculate flood levels. Utah Resp. at 47-49.[9] The State's objection is unreasonable given that the State

[7] Utah Resp. at 37-41 (Interrogatory Nos. 3-4, 6-7).

[8] See also Texas Utilities Electric Company (Comanche Peak Steam Electric Station), LBP-85-41, 22 NRC 765, 768 (1985) (requiring parties alleging overly broad requests to "interpret the request in a reasonable fashion" and to answer interrogatories "within the realm of reason").

[9] The State did respond to Interrogatory Nos. 2 and 3, but then hedged by stating that it needed more time to respond completely, based on its reevaluation of PFS's flooding analysis. Utah Resp. at 48-49.

has had the Applicant's calculations since mid-February.[10] Moreover, the State's response is deficient because the State did not provide the information now in its possession. Pilgrim, LBP-75-30, 1 NRC at 583 n.10. The Applicant's interrogatories ask for the State's positions on the issues. See PFS 1st Req. at 15. Indeed, Interrogatory Nos. 2-6 expressly request the State's position on the basis of the State's calculations. Id. The State cannot use its desire to evaluate the details of a recent RAI response as an excuse for its refusal to explain its allegations. See Pilgrim, LBP-75-30, 1 NRC at 583 n.10; Seabrook, LBP-83-17, 17 NRC at 498-99.

PFS therefore requests that the Board order the State to provide direct, complete, and specific answers for Interrogatories Nos. 1-6 for Utah M on the basis of the information the State has now.

B. Applicant's Requests for Admissions Must Be Deemed Admitted

Following up on informal discovery, PFS served requests for admission on the State in an attempt to narrow and focus the matters truly at issue, primarily with respect to Utah Contention K, where the contention alleges in broad general terms a wide range of potential impacts to the PFSF from nearby military and hazardous facilities.[11] PFS 1st

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[10] See Calculation No. 0599602-G(B)-12-0, PFSF Flood Analysis with Larger Drainage Basin, prepared by Stone & Webster, cited in Response to Request for Additional Information, question 2-3, under Letter from John Parkyn, Chairman, Private Fuel Storage, to Director, Office of Nuclear Material Safety and Safeguards, USNRC (Feb. 10, 1999).

[11] The requests covered a range of activities for the various facilities, sometimes in different combinations, in an attempt to identify the specific activities which the State claimed to present a significant hazard. For example, Request No. 1 requests admission about hazards from the Tekoi Rocket Engine Test facility other than those from rocket motors exploding or escaping their moorings, Request No. 2 about hazards other

Req. at 7-11, 14-15, 17, 19. The great majority of the requests, particularly those with respect to Utah K, were denied by the State on "information and belief." Utah Resp. at 21-34, 45-46, 57-60.[12] As defined by the State, this means "that after making reasonable inquiry into the subject of the discovery, the State lacks sufficient information or belief on the subject . . . on which to either deny or admit the request . . . ." See Utah Resp. at 2-3.

It is well established, however, that the denial of a request for admission for lack of information and belief, without more, is deficient as a matter of law. The NRC's rule governing requests for admission specifically provides in this regard that:

> Each requested admission shall be deemed made unless, . . . the party to whom the request is directed serves on the requesting party . . . a sworn statement denying specifically the relevant matters of which an admission is requested or setting forth in detail the reasons why he can neither truthfully admit nor deny them . . . .

10 C.F.R. § 2.742(b) (emphasis added). Thus, a request for admission may be denied for lack of information only upon setting forth "in detail" the reasons why the admission can neither be truthfully denied or admitted, which the State utterly fails to do.

The State apparently tries to meet its burden by employing in its general definition of "denied on information and belief" the claim of "making reasonable inquiry into the subject of the discovery." See Utah Resp. at 2-3. However, beyond this blanket asser-

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than rocket motors escaping their moorings, and Request No. 3 about all hazards from Tekoi. PFS 1st Req. at 7.

[12] The State denied on "information and belief," in whole or in part, 38 of the 52 requests filed by Applicant. Specifically, State denied on "information and belief" in whole or in part Utah K Requests for Admission Nos. 1-3, 6-12, 17-18, 20-25, 27-38; Utah M Request for Admissions Nos. 1 and 4; and Utah R Request for Admissions Nos. 1-5.

tion, the State's response provides no detail whatsoever to show any reasonable inquiry into the matters in the Applicant's requests. See id. at 2-3, 21-34, 45-46, 57-60. The federal courts applying FRCP 36 have held that a party's mere assertion of "reasonable inquiry" to support a claim of insufficient information to admit or deny the truth of a matter is deficient as a matter of law. Asea, Inc. v. Southern Pac. Transp. Co., 669 F.2d 1242, 1247 (9th Cir. 1981).[13] Rather, the response must show that the party made a reasonable inquiry.[14] Otherwise the matter in question will be deemed admitted. See United States v. Kenealy, 646 F.2d 699, 703 (1st Cir.), cert. denied, 454 U.S. 941 (1981) (matters deemed admitted where denials were "opaque, generalized, and tardy"). Here, the State has made no such showing and the requests for admissions should be deemed admitted.

The State also protested generally that it does not have to reply to the Applicant's requests concerning Contention Utah K because the Applicant has the burden of proof at the hearing. Utah Resp. at 20-21. However, the fact that applicants have the burden does not excuse intervenors from responding to discovery requests. Susquehanna, ALAB-613, 12 NRC at 339-40. The Advisory Committee Notes to the 1970 amendment to Rule 36 specifically rejected the notion that a party without the burden of proof did not have to respond to requests for admissions, noting that the reasonable inquiry required of such a

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[13] The NRC's rule on Requests for Admissions, Section 10 C.F.R. § 2.742 is analogous to Federal Rule of Civil Procedure 36. Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 460 (1974). Rule 36 "is an excellent guide to the proper interpretation and use of section 2.742." Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-26, 40 NRC 93, 96 (1994).

[14] Seals v. Wiman, 304 F.2d 53, 64 (5th Cir. 1962), cert. denied, 372 U.S. 915 (1963); Han v. Food & Nutrition Serv., 580 F. Supp. 1564, 1566 (D. N.J. 1984).

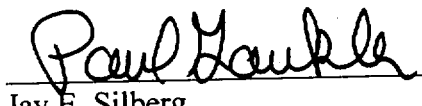
party was not "proving the other side's case" but rather would be necessary to its own case or to preparation for rebuttal. 48 F.R.D. 531, 533 (1970).

Under the foregoing law, the State's responses to PFS's requests are woefully deficient. Accordingly, the Board should deem the matters in PFS's requests (Utah K Nos. 1-3, 6-12, 17-18, 20-25, 27-38; Utah M 1 and 4, and Utah R Nos. 1-5) to be admitted.[15]

III. CONCLUSION

For the forgoing reasons, the Board should compel the State to produce the information requested by the Applicant's Interrogatories Nos. 1-7 related to Utah K and Interrogatories Nos. 1-6 related to Utah M. The Board should also deem as admitted the matters that were the subjects of the Applicant's Requests for Admissions Nos. 1-3, 6-12, 17-18, 20-25, 27-38 for Utah K ; Nos. 1 and 4 for Utah M and Nos. 1-5 for Utah R.

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.

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[15] If the Board were not to deem the matters in the relevant requests admitted, it should at the very least require the State immediately to squarely admit or deny those matters. See Vogtle, LBP-94-26, 40 NRC at 95-96 & n.6; Fed. R. Civ. P. 36(a).

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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(Private Fuel Storage Facility)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Motion to Compel Answers to Interrogatories and Admissions by the State of Utah 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 22nd day of April 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)

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

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

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

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

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

Diane Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg, L.L.P.
2001 S Street, N.W.
Washington, D.C. 20009
e-mail:DCurran.HCSE@zzapp.org

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

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