

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD 01 MAR 27 A10:22

In the Matter of:

Docket No. 72-22-ISFSI

~~OFFICE OF SECRETARY~~
RULEMAKINGS AND
ADJUDICATIONS STAFF

PRIVATE FUEL STORAGE, LLC
(Independent Spent Fuel
Storage Installation)

ASLBP No. 97-732-02-ISFSI

March 19, 2001

STATE OF UTAH'S MOTION TO COMPEL APPLICANT
TO RESPOND TO STATE'S TENTH SET OF
DISCOVERY REQUESTS ON UTAH CONTENTION Z

Pursuant to 10 C.F.R. § 2.742, the State of Utah hereby moves the Board to compel the Applicant, Private Fuel Storage, LLC (“PFS”) to answer certain requests for admissions, interrogatories, and document requests propounded in State of Utah’s Tenth Set of Discovery Requests Directed to the Applicant (February 28, 2001) (“State’s Discovery Requests”). PFS responded on March 12, 2001.¹

This Motion to Compel relates to all discovery requests that PFS has refused to answer with respect to Utah Z (No Action) except Interrogatory 1. The Board currently has before it PFS's Motion for Summary Disposition of Utah Contention Z.² The State

¹ Applicant's Objections and Responses to State of Utah's Tenth Set of Discovery Requests Directed to the Applicant ("PFS's Discovery Response").

² PFS filed its Applicant's Motion for Summary Disposition of Utah Contention Z -- No Action Alternative ("PFS Summary Disposition Motion") on February 14, 2001. The State and Staff filed responses to PFS's Motion for Summary Disposition on February 2001. See, State of Utah's Response to Applicant's Motion for Summary Disposition of Utah Contention Z ("State Response"), and NRC Staff's Response to Applicant's Motion for Summary Disposition of Utah Contention Z -- No Action Alternative ("Staff Response"). Also the State filed the State of Utah's Reply to the Staff's Response to the Applicant's

acknowledges that the Board may wish to rule on this Motion to Compel at the same time as the Board's decision on PFS's Motion for Summary Disposition of Utah Z. There is no merit in PFS's wholesale refusal to adequately respond to the State's Discovery Requests.

BACKGROUND

In its Discovery Requests, the State submitted 76 requests for admission, seven interrogatory requests, and four document requests. PFS refused to answer 69 of the 76 requests for admission, any of the seven interrogatory requests, and three of the four document requests.

PFS objected to the State's discovery requests to the extent that the requests 1) are not relevant and are outside the scope of Utah Z; 2) "request[] information not related to the no action alternative described in the DEIS"; 3) relate to the "need for the facility"; 4) "relate to the State's position that the NEPA environmental impact analysis mandates a substantive decision"; and 5) "relate to information regarding the environmental impacts from utilities continuing to store spent fuel at their reactor sites." PFS's Discovery Response at 20-23. The State has reviewed its Discovery Request and believes all the requests are relevant to and within the scope of Utah Z.

On March 16, 2001, the State sent a letter to PFS explaining the grounds for the State's anticipated Motion to Compel. See Letter from Denise Chancellor to Paul Gaukler dated March 16, 2001, attached hereto as Exhibit 1. The State and PFS could not resolve their dispute and the State informed PFS that it would proceed with this Motion to Compel.

Motion for Summary Disposition of Utah Contention Z ("State Reply") on March 16, 2001.

ARGUMENT

I. THE COMMISSION'S STANDARD FOR DISCOVERY IS ONE OF BROAD RELEVANCE TO ADMITTED CONTENTIONS.

The scope of allowable discovery is set forth in 10 C.F.R. § 2.740(b)(1). Unless otherwise determined by the Presiding Officer, discovery extends to “any matter, not privileged, which is relevant to the subject matter involved in the proceeding.” *Id.* The Commission gives its discovery rules the same “broad, liberal interpretation” that is given to the discovery rules of the U.S. Federal Courts. Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 461-62 (1974). Discovery is considered relevant unless it is “palpable that the evidence sought can have no possible bearing upon the issues.” *Id.* at 462, (*quoting* Hercules Powder Co. v. Rohm & Haas Co., 3 F.R.D. 302, 304 (D. Del. 1943)). A motion to compel need not seek information which would be admissible *per se* in an adjudicatory proceeding, and need only request information “that might lead to admissible evidence.” Safety Light Corp. (Bloomsburg Site Decontamination), LBP-92-3A, 35 NRC 110, 111-12 (1992); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-102, 16 NRC 1597, 1601 (1982); Commonwealth Edison, *supra*, 7 AEC at 462.

II. THE DISCOVERY SOUGHT BY THE STATE IS RELEVANT AND WITHIN THE SCOPE OF THE ADMITTED BASES OF UTAH Z.

For purpose of discovery, the State need only show that its discovery requests are relevant to an issue admitted for hearing or could reasonably lead to admissible evidence. *See* Section I *supra*. As more fully described below, the 69 disputed Requests for Admissions, six interrogatories, and four document requests are directly relevant or could lead to

admissible evidence because they address the advantages and disadvantages of the no action alternative.

Utah Z, as admitted, asserts that, “[t]he Environmental Report does not comply with NEPA because it does not adequately discuss the ‘no action alternative.’” Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), LBP 98-7, 47 NRC 142, 203, 256 (1998). However, PFS maintains that the scope of Utah Z is limited to whether the DEIS contains material related to the advantages of the no action alternative. PFS’s Discovery Response at 20. As discussed in the State’s Response and its Reply to the Staff’s Response, the scope of Utah Z also encompasses the adequacy of the no action alternative advantages and disadvantages described in PFS’s Environmental Report (“ER”) and the DEIS. *Sæ*, State’s Response at 4-5, State’s Reply at 2-4.

PFS objects on the basis that some of the discovery requests relate to financial or economic information and thus cannot be reasonably calculated to lead to the discovery of admissible evidence. PFS Discovery Response at 20. On November 9, 2000, the Board ruled that environmental (as opposed to economic) impacts formed the basis of Utah Z. Memorandum and Order (Ruling on Contention Utah Z Discovery Production Request) (November 9, 2000) at 4. PFS, however, reads the Board decision too narrowly. The Board accepted the argument that “Utah Z does not concern the comparison of the costs and benefits of the no-action alternative.” *Id.* (*emphasis added*). The Board also declared that “cost matters that are the focus of these discovery requests are not relevant to the litigation” of Utah Z. *Id.* at 7. Notwithstanding the Board’s exclusion of cost and cost-benefit issues, the Board noted “ [a]lthough certain aspects of some of these discovery requests might

involve matters other than economic costs, the State has made no attempt to support its motion to compel on any other grounds.” Id. at 7, n.1. Thus, the Board may have made a relevance finding had the State justified its discovery requests relating to economic or financial issues on grounds other than “economic costs.” Here the State justifies its discovery on grounds other than economic costs and thus, its discovery fits within the confines of Utah Z.

PFS objected to request for admissions 1-12, 26-27, 31-37, 39, 40-76, and Interrogatories 2-7 on the basis that they are beyond the scope of Utah Z. These admissions are directly relevant to Utah Z and relate to whether the no action consequences described in the DEIS are even valid and not mere speculation. The DEIS simply recites from the ER the consequences of no power, delays in decommissioning, and construction impacts at reactor sites. If the consequences are not valid, then the DEIS will not provide any meaningful information from which to make decisions or inform the public.³ There is no merit in PFS’s refusal to respond.

Requests for admission 1, 4, 5, 7, 26, 29-30, 36, 37, 39, 40-46, 48-58, 60-68 are directly relevant to the advantages and disadvantages challenged in Utah Z. PFS itself argues

³ With respect to Request for Admission No. 7, the State made a similar request for admission to the Staff. *Sæ* State of Utah’s Seventh Set of Discovery Requests Directed to the NRC Staff (August 31, 2000), Request for Admission No. 7 (“Do you admit that regardless of the PFS proposal, fuel will continue to accumulate in existing at-reactor storage facilities”) at 9. In granting the State’s Motion to Compel, the Board determined that “in making [its] no-action statement [about the two most likely no-action scenarios involved] the staff must have been acting on some assumptions regarding utilization and storage capacity of existing at-reactor storage facilities.” *Sæ* Memorandum and Order (November 9, 2000) at 3. Similarly, PFS must have been “acting on some assumptions regarding utilization and storage capacity” in making the same claims in its ER. ER at 8.1-2 to -4.

that environmental information relating to the no action alternative discussion may be encompassed in other sections of the EIS, including the “flip side” of the no action discussion. PFS Summary Disposition Motion at 5, 8. The State agrees to the extent some information relating to need for the facility is directly relevant to evaluating the impacts of the no action alternative. In fact, many National Environmental Policy Act (“NEPA”) issues are interrelated and cannot be parsed into segregable units. Moreover, if PFS cannot demonstrate that there is a need for its facility, then it cannot claim the items listed in the disputed admissions as disadvantages of the no action alternative. The State requests that the Board order PFS to respond to these requests for admission.

The instant discovery is similar to discovery the Board compelled the Staff to answer. The State requested documents from the Staff relating to quantifying the air pollutants that may be released from the increased use of fossil fuel if the PFS facility is not licensed (State’s 7th Set to Staff, Document Request No. 10), information identifying reactors that could be permanently shut down earlier if the PFS facility is built (id., Document Requests Nos. 11 and 14), and all information that identifies any reactor sites at which building at-reactor ISFSIs due to physical limitations is prevented (id., Document Request No. 16). State of Utah’s Seventh Set of Discovery Requests Directed to the NRC Staff (August 31, 2000) at 10-11. The Staff argued the requests were not within the scope of Utah Z but went to the need for the facility. Memorandum and Order (November 9, 2000) at 5. In granting the State’s motion to compel the Staff to respond, the Board found that those document requests have a legitimate nexus to Utah Z and could lead to the discovery of admissible evidence with respect to Utah Z. Id. at 5. The State urges the Board to make a

similar finding with this Motion to Compel. PFS's argument that the State's discovery requests relate to need and have no nexus to Utah Z should be rejected.

PFS objected to Requests for Admission 69-75 in that they "seek[] information relating to the asserted environmental advantages of the no-action alternative." PFS Discovery Response at 47-51. This is exactly the scope of Utah Z as claimed by PFS. The admission requests relate to advantages excluded or inadequately analyzed which are within the scope of Utah Z. Moreover, the adequacy of the purported advantages described in the DEIS goes, in part, to the heart of Utah Z. *See* State's Response at 4-5 and State's Reply at 2-3. Clearly, these requests for admission are relevant to Utah Z and should be answered.

Requests for admissions 18-25 relate to the impacts described in the DEIS. The admissions relate to whether PFS has any relevant evidence with respect to the scope and quantification of the impacts described in the DEIS. Again the requests are relevant and PFS has no basis for not providing a response.

Unlike Interrogatory 1, Interrogatories 5 through 7 relate to only four admissions -- a devise that PFS has employed in its discovery to the State. *See* State's Letter to PFS, Exhibit 1. These three interrogatories are not unduly burdensome.

III. THE DISCOVERY SOUGHT BY THE STATE IS NOT OVERLY BURDENSOME OR REDUNDANT.

PFS objected to request for admissions 6, 8-12, 20-25, 35, 47, 51, 59, 68, 69, and Interrogatories 2-7 on the basis that the admissions seek information that is duplicative and cumulative to the Commission's findings. The State is entitled to relevant material that PFS may possess whether or not PFS is in agreement with the Commission's position. Thus, the

discovery is not overly burdensome or redundant.

PFS also objected to request for admissions 31 and 34 as being overly burdensome to evaluate 72 sites. Yet the DEIS and the ER make no attempt to justify or quantify the purported consequences of the no action alternative (e.g., loss of power generation due to premature shutdown of reactors, etc.). *Sæ* State Response at 7-12. If the DEIS claims no action consequences at 72 sites, it must quantify those consequences. The State has a right to discover any material possessed by PFS that relates to quantifying or justifying the claimed consequences. Therefore, the requests are relevant and not overly burdensome.

IV. THE DOCUMENT DISCOVERY REQUESTS ARE RELEVANT AND WITHIN THE SCOPE OF UTAH Z.

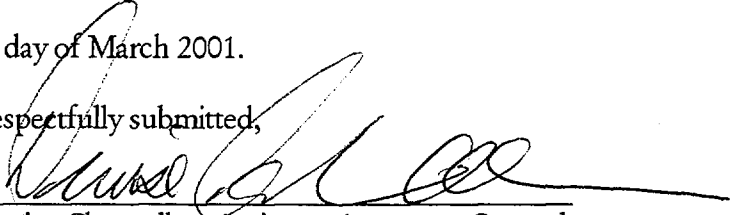
PFS refused to respond to document requests related to the State's request for admissions and interrogatories on the same basis as its refusal to answer the request for admissions and interrogatories. For the reasons stated in sections II and III *supra* the State requests the Board to compel PFS to make the requested documents available

CONCLUSION

The Applicant's refusal to respond to almost the entirety of the State's discovery is without merit. For the foregoing reasons, the State urges the Board to order PFS to answer the disputed requests for admission, interrogatories, and make the requested documents available for review.

DATED this 19th day of March 2001.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S MOTION TO COMPEL APPLICANT TO RESPOND TO STATE'S TENTH SET OF DISCOVERY REQUESTS ON UTAH CONTENTION Z was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this March 19, 2001:

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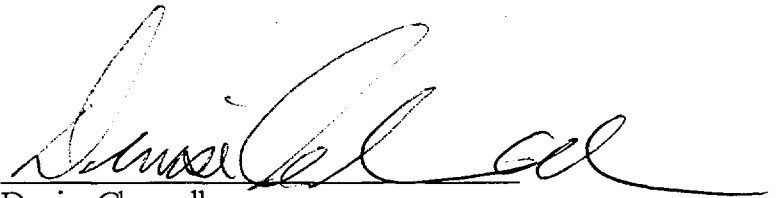
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A handwritten signature in black ink, appearing to read "Denise Chancellor", written over a horizontal line.

Denise Chancellor
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March 15, 2001

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Via E-mail and First Class Mail

re: State's Proposed Motion to Compel PFS to Respond to
State's Tenth Set of Discovery Requests (Contention Z) (Feb. 28, 2001)

Dear Paul:

You mentioned, prior to filing the response to the State's Tenth Set of Discovery to PFS, that PFS may be willing to answer a more limited number of requests for admission relating to Utah Z. Given PFS's almost total failure to provide any responses to discovery on Utah Z, I am not sure that we will get very far in settling our dispute. But I am willing to listen. Below is a description of why the discovery is relevant and should be answered.

Admissions 1-12, 26-27, 31-37, 39, 46-76, and Interrogatories 1-7 are objected to on the basis that they are beyond the scope of Utah Z. These admissions are directly relevant to Utah Z and relate to whether the no action consequences described in the DEIS are even valid and not mere speculation. The DEIS simply recites from the ER the consequences of no power, delays in decommissioning, and construction impacts at reactor sites. If the consequences are not valid, then the DEIS will not provide any meaningful information from which to make decisions or inform the public.

Admissions 1, 4, 5, 7, 26, 29-30, 36, 37, 39, 40-46, 48-58, 60-68, and Interrogatory 1 are directly relevant to the advantages and disadvantages challenged in Utah Z. If PFS cannot demonstrate that there is a need for its facility, then it cannot claim the items listed in the disputed admissions as disadvantages of the no action alternative.

Admissions 6, 8-12, 20-25, 35, 47, 51, 59, 68, 69, and Interrogatories 1-7 are objected to on the basis that the admissions seek information that is duplicative and cumulative to the Commission's findings. The State is entitled to relevant material that PFS may possess whether or not PFS is in lockstep with the Commission's position.

Admissions 68-75, and Interrogatory 1 are objected to in that they "seek[]" information

Paul Gaukler, Esq.
March 15, 2001
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relating to the asserted environmental advantages of the no-action alternative." This is exactly the scope of Utah Z as claimed by PFS. The admission requests relate to advantages excluded or inadequately analyzed which are within the scope of Utah Z.

Admissions 31, 34, and Interrogatory 1 are objected to as being overly burdensome to evaluate 72 sites. If the DEIS claims no action consequences at 72 sites, it must quantify those consequences.

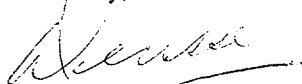
Admissions 18-25, and Interrogatory 1 relate to the impacts described in the DEIS. The admissions relate to whether PFS has any relevant evidence with respect to the scope and quantification of the impacts described in the DEIS.

PFS objected to the scope of Interrogatory No. 1. The State anticipated that PFS would answer a number of the admissions in the affirmative, thus limiting the scope of the interrogatory. Furthermore, notwithstanding objections, the State has recently answered multi-part interrogatories from PFS in order to avoid a prolonged dispute. See Utah's February 28, 2001, Response to PFS's 6th Set of Discovery, Utah O, Interrogatory No. 8 and Utah DD, Interrogatory No. 7. Given the number of admissions at issue in Interrogatory No. 1 the State will not pursue an answer to this interrogatory in its motion to compel. The State will, however, file a motion to compel on Interrogatories 5 through 7.

Interrogatories 5 through 7 relate to only four admissions -- a devise that PFS has employed in its discovery to the State. See e.g., PFS's First Set of Discovery to the State dated April 2, 1999, Utah K Interrogatory Nos. 1 ("To the extent the State does not admit admissions 3, 18, 24, and 28 above, identify"); 2 ("To the extent the State does not admit admissions 29-32 above, identify [sic] ..."); 3 ("Identify and fully explain the ... bases on which the State claims that each of the activities and/or materials identified in response to interrogatories 1 and 2 above ..."); 4 ("To the extent the State does not admit admissions 29-32 above, identify"); 5 ("To the extent the State does not admit admissions 3, 18, 24, and 28 above, identify"); 6 ("Identify and fully explain the scientific, technical and/or other bases on which the State claims that each of the accidents identified in response to interrogatories 4 and 5 above...").

Please contact me if we can resolve any of the above issues. Otherwise, I will file a Motion to Compel by the deadline, Monday, March 19, 2001.

Sincerely,



Denise Chancellor
Assistant Attorney General