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May 25, 2001

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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 REPLY TO OHNGO GAUDADEH DEVIA'S (OGD)  
RESPONSE TO PRIVATE FUEL STORAGE'S (PFS) MOTION FOR  
PROTECTIVE ORDER RESTRICTING SCOPE OF DEPOSITION**

Applicant Private Fuel Storage L.L.C. ("PFS") hereby files this reply to "Ohngo Gaudadeh Devia's (OGD) Response to Private Fuel Storage's (PFS) Motion for Protective Order Restricting Scope of Deposition" ("OGD's Response").<sup>1</sup> The reply is limited to points that interveror Ohngo Gaudadeh Devia ("OGD") made toward the end of its Response under the heading "OGD Must be Permitted to Continue Deposition of Mr. Bear," which concerns matters that arose in the context of the deposition of Chairman Bear on May 3, 2001. While PFS believes that OGD's discussion there is irrelevant to its underlying Motion for Protective Order, PFS files this reply to put the matters discussed by OGD in context. Both PFS and OGD have already exchanged lengthy letters concerning this matters, copies of which are attached as Exhibit 1<sup>2</sup> and Exhibit 2<sup>3</sup> to this Reply. In

<sup>1</sup> Because the Licensing Board has indicated that it may act quickly on PFS's Motion for a Protective Order, PFS is filing its proposed reply simultaneously with its request for leave to file the reply so the reply would be immediately available to the Board if it grants such leave.

<sup>2</sup> Letter from Samuel E. Shepley to Jay E. Silberg (May 8, 2001).

<sup>3</sup> Letter from Jay E. Silbert to Samuel E. Shepley (May 17, 2001).

addition, PFS notes that with respect to OGD's claim of refusal to allow questions concerning the scope of Chairman Bear's future testimony (OGD Response at 13), PFS's identification of Chairman Bear as a witness states that he "will testify to the impacts of the PFS project within the scope of Contention OGD O – Environmental Justice on the Skull Valley Band of Goshutes."<sup>4</sup> PFS counsel freely allowed and encouraged questioning of Chairman Bear on such potential impacts. See, e.g., Tr. at 200.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Paul Gaukler", is written over a horizontal line.

Jay E. Silberg

Ernest L. Blake, Jr.

Paul A. Gaukler

D. Sean Barnett

SHAW PITTMAN

2300 N Street, N.W.

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Counsel for Private Fuel Storage L.L.C.

Dated: May 25, 2001

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<sup>4</sup> See Applicant's Objections and Responses to OGD's Second Requests for Discovery (March 7, 2001), "PFS Potential Witness List for OGD Contention O" at 5.

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

**CERTIFICATE OF SERVICE**

I hereby certify that copies of Applicant's Reply to Ohngo Gaudadeh Devia's (OGD) Response to Private Fuel Storage's (PFS) Motion for Protective Order Restricting Scope of Deposition were served on the persons listed below (unless otherwise noted) by electronic mail with conforming copies by U.S. mail, first class postage prepaid, this 25<sup>th</sup> day of May 2001.

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Attention: Rulemakings and Adjudications  
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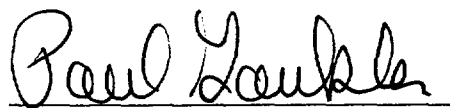
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Paul A. Gaukler

## **Exhibit 1**

**May 8, 2001 Ltr from Samuel E. Shepley  
to Jay E. Silberg re: OGD Depositions**

# Steadman & Shepley, LC

Attorneys at Law

Samuel E. Shepley, Esq.

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Payson, Utah 84651-2808 USA  
(801) 465-0703

Fax: (801) 465-0733

E-mail: Steadman&Shepley@usa.com

**Via E-mail and U.S. Mail**

May 8, 2001

Jay E. Silberg  
Shaw, Pittman  
2300 N Street, NW  
Washington, D.C. 20037

E-mail: jay\_silberg@shawpittman.com

Re: OGD Depositions

Dear Jay:

As we discussed last Friday, we need to schedule a time to finish Leon Bear's deposition and a separate time to take John Parkyn's deposition. It would seem that events conspired to make it impossible to finish Mr. Bear's deposition in the time that ended up being available last Thursday, and both Mr. Bear and Mr. Donnell referred us to Mr. Parkyn on some issues during their depositions.

We originally noticed Mr. Bear's deposition for Friday, April 27, 2001 at 8:30 a.m., to continue from day to day until completed. We also originally noticed Mr. Parkyn's deposition, as the sole PFS employee or officer on the list of persons provided by Applicant in response to OGD's Interrogatories No. 9 and 10, OGD's Second Requests for Discovery, for Friday, April 27, 2001 at 1:45 p.m., to continue from day to day until completed. Both of these deposition notices referred to Mr. Bear's letter and attachment dated February 16, 1999, submitted to the NRC by PFS on February 18, 1999, as a response to an EIS Request for Additional Information.

To accommodate the schedules of Mr. Bear and you, we mutually agreed to reschedule Mr. Bear's deposition to Thursday, May 3, 2001. When you indicated you would arrive in Salt Lake City the night before and still be on East Coast time, we suggested moving the starting time to 7:30 or 8:00 Thursday morning. After checking with Mr. Bear, you indicated he preferred 9 a.m. so we settled on that time and so noticed the deposition, to continue from day to day until completed.

You also indicated that Mr. John Donnell, a Stone & Webster employee designated as the PFS Project Manager, was the PFS "employee" who assisted Mr. Leon D. Bear in his authorship of the letter and attachment dated February 16, 1999. You suggested Mr. Donnell would be better

able to answer questions concerning that submission than would Mr. Parkyn and proposed we depose Mr. Donnell instead of Mr. Parkyn. We accepted your recommendation, reserving the right to also depose Mr. Parkyn, if we felt it was required.

You later told us Mr. Donnell would be available at the same time as Mr. Bear and recommended a joint deposition of both witnesses. We expressed some apprehension but reluctantly agreed to at least start with a joint deposition, reserving the right to take separate depositions. Since our original deposition plan was to start both Mr. Bear's and the PFS deposition by thoroughly cross-examining the witnesses on the Leon Bear letter and submission, it appeared a joint deposition could work, for at least part of the depositions. We so noticed Mr. Donnell's deposition, at least starting as a joint deposition, to continue from day to day until completed.

On the day of the scheduled depositions it seems that almost everything that could go wrong did indeed go wrong:

- Although you and Mr. Donnell arrived a few minutes early, Mr. Bear was an hour late.
- We were told that Mr. Donnell's flight home was scheduled for the one o'clock hour so we needed to totally rearrange our planned depositions to finish with him in time to catch that flight.
- We were presented with confidentiality agreements we had never seen before and asked to sign them before starting the depositions (these confidentiality agreements alone took up more than an hour of what would otherwise have been available for the depositions).
- Mr. Bear arrived without counsel, said he had consulted with an attorney but refused to disclose the name of his attorney and whether that attorney represented the Tribe or Mr. Bear individually.
- Neither you nor Mr. Bear knew that he had been designated as a witness on our contention by PFS.
- When we attempted to discover the scope of Mr. Bear's anticipated testimony, Mr. Bear and you refused to describe the scope of Mr. Bear's testimony on the basis that it was attorney work product, so we could not focus the scope of our deposition.
- There were numerous relevancy objections interposed by PFS counsel as we were trying to explore the witness's NRC submissions, biases, background, and expertise in a variety of areas related to the Band and environmental justice area,

but instead of following the normal procedure of noting the objection for the record and having the witness answer the question, it seemed all too common to object and advise the witness not to answer. After such objections the witness typically refused to answer "on the advice of counsel."

- There were lengthy discussions on many of these relevancy objections, consuming another hour or two of what would otherwise been available for finishing the depositions.
- Although, Mr. Bear had agreed to go forward with the deposition in the absence of counsel representing the Band and contrary to the notice of deposition that stated the deposition shall continue day to day until completed, Mr. Bear walked out of the deposition when you walked out, just after 3:30 p.m.

The miracle of the day was that despite all of the problems and professional disagreements, tempers never flared, hostilities never arose and everyone maintained a professional, even pleasant, manner. We all worked to accommodate each other's schedules and tried to finish the depositions in the extremely limited remaining time available. As just one indication of the spirit of cooperation that dominated the depositions, everyone agreed to forego lunch in order to try to meet what ended up being an impossible deadline.

Last Friday, when we attempted to schedule a time to finish Mr. Bear's deposition and take Mr. Parkyn's deposition, you asked us to provide you a list of the general areas those depositions would encompass. The deposition is to explore Mr. Bear's "expertise" and other bona fides in the areas he plans to testify as a witness and with respect to the information he has supplied to the NRC as a writer and source of information relied upon by the NRC.

Leon D. Bear is listed as a witness for PFS with respect to OGD Contention "O," both as a purported Tribal leader and as a person purportedly knowledgeable about environmental justice as a topic. He is also the author of written responses and other material submitted by PFS, and relied on by the NRC, as part of the license application process. PFS is on record stating that the responses and other material Mr. Bear helped write comprise "documents that address impacts falling within the scope of OGD 'O.'" PFS also lists Mr. Bear as an information source, a person who "supplied information to PFS concerning environmental justice issues relevant to Contention OGD 'O.'"

Topics that will be addressed to Mr. Bear include:

- As a witness: compensation, bias, competence, and veracity;
- As a writer and source of information: authorship, contribution by colleagues, bases, accuracy, authority, and content.



Jay Silberg, Esq.  
May 8, 2001  
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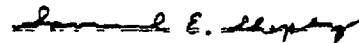
These topics are typical of those addressed at depositions. All questions asked and to be asked Mr. Bear bear directly on one or more of these topics. Our questions were prepared ahead and were intended to follow an order and build on one another for maximum efficiency. After preliminary questions, OGD intended to proceed through the 2/16/99 documents paragraph by paragraph because by doing so a variety of the topics would be covered efficiently. Also by concentrating on these documents (which PFS was on record as specifying were "documents that address impacts falling within the scope of OGD 'O'"), OGD hoped not to spend time working around "relevancy" objections.

Our deposition plan remains uncompleted. None of the topics were fully addressed, for reasons given above, vital questioning was restricted and abruptly curtailed, despite OGD's good faith effort to accommodate your scheduling requirements. OGD was never permitted to proceed beyond the first few paragraphs of the 2/16/99 documents. Completing the questioning of Mr. Bear with respect to these documents is vital to OGD's Plan and is necessary in order to fully address the topics, and to justify party and NRC reliance on the documents.

As for Mr. Parkyn's deposition, as CEO, Mr. Parkyn is the decision maker. We need to know who made what decisions on behalf of PFS. Mr. Parkyn is involved in every Board decision where Mr. Donnell is not. Mr. Parkyn is involved in defending contentions such as OGD "O," where Mr. Donnell may not be involved. Both Mr. Donnell and Mr. Bear referred some questions to Mr. Parkyn during last Thursday's deposition. We reserved the right to depose Mr. Parkyn and we need to do so.

We will telephone you this afternoon to schedule a time to finish Mr. Bear's deposition and take Mr. Parkyn's deposition. Please feel free to call us if we may be of any additional assistance in this matter.

Sincerely,  
STEADMAN & SHEPLEY, LC



Samuel E. Shepley, Esq

SES/clb

## **Exhibit 2**

**May 17, 2001 Ltr from Jay E. Silberg  
to Samuel E. Shepley re: OGD Depositions**

# ShawPittman

*A Law Partnership Including Professional Corporations*

JAY E. SILBERG  
202.663.8063  
jay.silberg@shawpittman.com

May 17, 2001

Samuel E. Shepley, Esq.  
Steadman & Shepley, LC  
550 South 300 West  
Payson, Utah 84651-2808

Re: OGD Depositions

Dear Sam:

I am writing with respect to your letter of May 8, 2001 to, among other things, correct various inaccuracies in your letter. The stated purpose of your letter is to schedule a time to continue Leon Bear's deposition and a separate time to take John Parkyn's deposition, which topics I will address in that order.

I note at the outset, however, that OGD waited until April 20, 2001, only ten days prior to the scheduled date for completion of depositions, to notice the depositions of Leon Bear and John Parkyn. This was contrary to the Licensing Board's strong suggestion that OGD make arrangements to conduct Mr. Bear's deposition early within the limited discovery window for the environmental contentions (which commenced January 16, 2001) so that problems and objections could be dealt with at the outset rather than at the close of this period.<sup>1</sup> It was not possible on such short notice to fit the April 27, 2001 deposition date chosen by OGD into Mr. Bear's or my schedule. Therefore, I worked with your co-counsel, Duncan Steadman, to arrive at a mutually acceptable date for all concerned, May 3, 2001, and agreed to PFS's joining in a request to the Licensing Board to extend the deposition period. I also suggested to Mr. Steadman that OGD may want to depose PFS's Project Director, John Donnell, who had more direct first-hand knowledge of the matters identified for the deposition than Mr. Parkyn. I further suggested a joint deposition of Mr. Bear and Mr. Donnell based on the belief that such might be more efficient based on our previous experience with the State in conducting joint depositions. Thus, despite the late date at which the depositions were noticed, we recognized that your firm was new to the proceeding and sought to work with you to enable OGD to obtain the deposition testimony that it sought with respect to Contention OGD O.

<sup>1</sup> Board Memorandum and Order (Ruling on Motions to Extend Discovery and to Quash Deposition Notice) of June 14, 1999 at pp. 6-7.

Samuel E. Shepley  
May 17, 2001  
Page 2

Your letter also describes various events during the day of the deposition to which I must take exception. You first incorrectly assert that "Mr. Bear was an hour late" to the deposition. Mr. Bear arrived perhaps 15 minutes after the 9:00 a.m. agreed starting time, and the transcript reflects that the deposition commenced at 9:35 a.m. Mr. Bear was not the "hour late" that you claim.

You also claim that you were presented with confidentiality agreements that you "had never seen before and asked to sign them before starting the depositions." That is simply wrong. We had provided a copy of the proposed confidentiality agreement to OGD's previous counsel (Joro Walker) on January 11, 1999, more than two years ago. As referenced in various pleadings and Licensing Board Orders, OGD chose not to execute the agreement at that time<sup>2</sup> despite the fact it is in substance the same as the agreement between PFS and the State under which PFS has been providing the State confidential information since 1998.

Moreover, shortly after the deposition notice had been filed, I advised your colleague, Mr. Steadman, that PFS and Band discovery documents were available for your review, but that some of the documents were confidential and would require the execution of a confidentiality agreement prior to being reviewed. Further, on the evening of May 2, 2001 before the deposition, you visited Parsons Behle to review the documents, and were shown a copy of the confidentiality agreement and advised of the need to sign the agreement to review confidential documents, which you refused to do. You also took a copy of the agreement with you for Ms. Bullcreek, but she has also refused to sign the agreement, as reflected below.

Thus, OGD has long known of the need for a confidentiality agreement to review confidential information, and your firm was specifically advised of this need more than a week prior to the deposition. Nevertheless no action was taken to execute the agreement, nor was any attempt made to negotiate different terms prior to the deposition.

Your letter also claims that discussion concerning the confidentiality agreements "alone took up more than an hour of what would otherwise have been available for the

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<sup>2</sup> Applicant's Objections and Responses to OGD's First Requests for Discovery (May 20, 1999) at 8 & fn. 3; Intervenor OGD's Motion to Compel Answers to Interrogatories and to Produce Documents Directed to the Applicant (May 27, 1999) at 12; Applicant's Response to OGD's Motion to Compel Answers to Interrogatories and to Produce Documents (June 16, 1999) at fn. 6; Board Memorandum and Order (Denying Motion to Compel) at 5.

Samuel E. Shepley  
May 17, 2001  
Page 3

depositions.” While some additional time was taken up with the confidentiality agreement, almost all of this time was due to the fact that you and Ms. Bullcreek refused to sign any confidentiality agreement and Mr. Steadman insisted on negotiating additional terms beyond those which the State had signed approximately three years ago and which had been presented to OGD more than two years ago.

In your letter you also make point of the fact that Band counsel was not present at the deposition. However, as lead counsel opposing OGD O, PFS counsel is responsible under the Licensing Board’s Order for litigating the contention, including “conduct[ing] all discovery on the contention.”<sup>3</sup> In this respect, Mr. Bear was identified by PFS as one of its witnesses for OGD O,<sup>4</sup> and it was perfectly proper for me, as PFS’s counsel, to defend Mr. Bear’s deposition. You also claim in your letter that I did not know that Mr. Bear had not been identified by PFS as a witness. This assertion is again incorrect and is contradicted by the deposition transcript.<sup>5</sup>

Finally, you refer to relevancy objections that I raised at various points in the deposition. I generally raised relevancy objections only after some period of time in an attempt to focus the deposition back on matters of relevance to OGD O. Throughout the deposition, you and your colleague, Mr. Steadman, continued to ask numerous questions on various issues, such as Band governance, that are simply beyond the scope of OGD O. On several occasions, I did advise Mr. Bear not to answer certain questions, but only after lengthy questioning on irrelevant matters in an effort to move the deposition along.

In terms of Mr. Bear’s and my departure shortly after 3:30 p.m., I had advised you at the outset of the deposition that I had a plane to catch at 4:40 p.m. in order to return to Washington. I agree that everyone cooperatively agreed to forego lunch in order to complete the deposition before that time, but I totally disagree that it was “an impossible deadline” to meet. Had you focused your questions on those matters relevant to OGD O, the deposition could have easily been completed by that time. As it was, you consumed extensive deposition time on internal Band governance and finance matters that are outside the scope of OGD O. These include:

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<sup>3</sup> Private Fuel Storage, L.L.C. (Independent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 244 (1998).

<sup>4</sup> Applicant’s Objections and Responses to OGD’s Second Requests for Discovery (March 7, 2001).

<sup>5</sup> Tr. at 147.

Samuel E. Shepley  
May 17, 2001  
Page 4

- Internal Band governance issues, such as whether Mr. Bear is in fact Chairman of the Skull Valley Band. Tr. at 4-5, 26-30, 230-235.
- Internal Band governance processes and procedures, such as the existence of a Constitution, the use of meeting resolutions and attendance rolls, and the existence and scope of confidentiality resolutions. Tr. at 19-21, 42-54.
- Internal Band operations and allocation of Band monies. Tr. at 102-109, 116-119, 121-142.
- Internal Band disputes. Tr. at 144-145, 153-160.
- Internal Band resolutions concerning governance. Tr. at 169-178.
- Internal Band matters concerning approval of the PFS lease. Tr. at 178-200.

Such internal Band governance and finance matters are unrelated to the potential environmental impacts to be analyzed by the NRC under NEPA. Whether or not such issues might be properly be raised in other forums, they are clearly beyond the scope of the NRC licensing proceeding.

The day after the deposition your colleague, Mr. Steadman, called to arrange for a time to continue Mr. Bear's deposition. I responded to Mr. Steadman that, to the extent OGD had questions remaining of Mr. Bear concerning environmental impacts relevant to the environmental justice issues raised in OGD O, we would be willing to make Mr. Bear available for additional questioning. However, given the lengthy excursions into irrelevant issues during the previous day's deposition, I requested identification of the general subject areas that the additional questioning would encompass.

Your May 8, 2001 letter purportedly responds to my request. However, the topics of inquiry identified in your letter convey no information concerning the substantive areas of intended examination. Rather, they are the same amorphous areas of "bias," "veracity," "compensation," "authority," etc, that were advanced at the deposition as justification for your lengthy excursions into internal Band governance and finance matters totally irrelevant to OGD O.<sup>6</sup> Therefore, as we subsequently advised Mr. Steadman, we are seeking a protective order from the Licensing Board to limit the scope

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<sup>6</sup> Your letter also makes reference to proceeding through the February 16, 1999 RAI response document. However, your were purportedly following that same approach in the May 3, 2001 deposition with its lengthy excursions into irrelevant areas.

Samuel E. Shepley

May 17, 2001

Page 5

of any continuation of Mr. Bear's deposition to environmental impacts relevant to the environmental justice issues raised in OGD O. We further agreed with Mr. Steadman to make Mr. Bear available the last week of May subject to the Board acting on our motion for a protective order, as reflected in the May 11, 2001 joint request for an extension of time for OGD to complete the deposition of Mr. Bear.<sup>7</sup>

Your May 8, 2001 letter also requested a date for OGD to depose Mr. Parkyn. As subsequently reflected in the May 11, 2001 joint request for an extension, we have reached resolution concerning Mr. Parkyn's deposition. In the event PFS identifies Mr. Parkyn as a witness for OGD O, PFS will make him available for deposition concerning the subject matter of his expected testimony.<sup>8</sup> Also, as testified to by Mr. Donnell at the May 3<sup>rd</sup> deposition, PFS stipulates that it has not performed any separate, specific study with the stated objective of looking for "disparate impacts." Rather, it has performed numerous studies of the specific impacts, including potential impacts on the Band, that might result from the project.

Finally, a separate but related matter of discussion in our recent telephone conversations has been OGD's summary identification on May 1, 2001 of new expert witnesses.<sup>9</sup> As we discussed in our telephone conversation with Mr. Steadman on that same day, OGD needs to supplement its discovery responses to provide the information requested for OGD's witnesses. To give you an idea of the type of information we expect OGD to provide, we e-mailed to Mr. Steadman PFS's identification of witnesses for OGD O.<sup>10</sup> In our May 1<sup>st</sup> conversation, Mr. Steadman indicated it would take approximately a week for OGD to supplement its answers concerning expected witnesses. However, in a conversation on May 10, 2001, he stated that it was taking longer than anticipated to assemble this information, but promised to provide us some of the requested information this week, with the rest to follow at some later unspecified

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<sup>7</sup> Joint Request to Extend Date for Completion of OGD Depositions of PFS Witnesses (May 14, 2001)

<sup>8</sup> As discussed with Mr. Steadman, a joint motion requesting leave of the Board for the conduct of the deposition would be required.

<sup>9</sup> OGD's Corrected Designation of Experts (May 1, 2001).

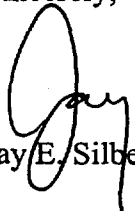
<sup>10</sup> E-mail from Paul Gaukler to Duncan Steadman (May 1, 2001) attaching Applicant's Objections and Responses to OGD's Second Requests for Discovery (March 7, 2001).

Samuel E. Shepley  
May 17, 2001  
Page 6

time. In both the May 1<sup>st</sup> and May 10<sup>th</sup> conversations, Mr. Steadman agreed that OGD would make available the witnesses it eventually identifies for deposition by PFS.<sup>11</sup>

We have yet to receive, however, any of the requested information concerning OGD's witnesses. We request that OGD provide this information as soon as possible so we can decide whether we need to depose any of the witnesses that are eventually identified by OGD.

Sincerely,



Jay E. Silberg

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<sup>11</sup> As with respect to Mr. Parkyn, a joint motion requesting leave of the Board to conduct the depositions would be required.