

October 22, 2001  
**DOCKETED 10/23/01**

UNITED STATES OF AMERICA  
 NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE, LLC	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent	)	
Fuel Storage Installation)	)	

NRC STAFF'S MOTION FOR PROTECTIVE ORDER, AND  
 RESPONSE TO "STATE OF UTAH'S MOTION TO COMPEL  
 NRC STAFF TO RESPOND TO STATE'S TWELFTH SET  
OF DISCOVERY REQUESTS (CONTENTION L, PART B)"

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.730(c), 2.740(c) and 2.740(f), the NRC Staff ("Staff") hereby (a) responds to the "State of Utah's Motion to Compel NRC Staff to Respond to State's Twelfth Set of Discovery Requests (Contention L, Part B)," dated October 10, 2001, and (b) requests that the Atomic Safety and Licensing Board issue a Protective Order to protect the Staff from the "annoyance, . . . oppression, or undue burden or expense" which would result if the Staff were required to provide further responses to the "State of Utah's Twelfth Set of Discovery Requests Directed to the NRC Staff" ("Twelfth Request"), dated September 18, 2001.

As more fully set forth below, the Staff submits that it has properly responded in part and objected in part to the State of Utah's ("State") Twelfth Request, in the "NRC Staff's Objections and Responses to the 'State of Utah's Twelfth Set of Discovery Requests Directed to the NRC Staff' ("Staff Response"), dated October 3, 2001, as later supplemented by the Staff's production of documents in response thereto. Accordingly, the Staff respectfully submits that it is entitled to a protective order, and that the State's motion to compel responses to its Twelfth Request should be denied.

## DISCUSSION

### A. Contention Utah L, Subpart B.

In Contention Utah L, Subpart B, the State challenges the request filed by Private Fuel Storage, L.L.C. (“PFS” or “Applicant”), for an exemption from the requirements in 10 C.F.R. Part 72 pertaining to the seismic design of its proposed independent spent fuel storage installation (“ISFSI”), to allow PFS to employ a probabilistic seismic hazard analysis (“PSHA”) with a 2,000-year return period. *See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), “Memorandum and Order (Requesting Joint Scheduling Report and Delineating Contention Utah L),”* slip op. at 2-3 (June 15, 2001); *Id.*, CLI-01-12, 53 NRC 459 (2001).

On September 18, 2001, the State filed its twelfth set of discovery requests directed to the Staff, in which it set forth 29 requests for admission and 19 document requests concerning Contention Utah L, Subpart B. On October 3, 2001, the Staff timely filed its responses and objections to the State’s Twelfth Request, supported by the Affidavits of Allen G. Howe (a Section Chief in the Rulemaking and Guidance Branch, Office of Nuclear Materials Safety and Safeguards) and Michael D. Waters (backup Project Manager in the NRC Spent Fuel Project Office for the PFS application). Further, by letters dated October 5 and 17, 2001, the Staff produced or identified documents responsive to the State’s Twelfth Request.<sup>1</sup>

### B. Legal Standards Governing Discovery From the Staff.

It is well established that discovery against the Staff rests on a different footing than discovery in general. *See Consumers Power Co. (Midland Plant, Units 1 and 2),* ALAB-634, 13 NRC 96, 97-98 (1981). While discovery from parties in an NRC adjudicatory proceeding is

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<sup>1</sup> See letters from Sherwin E. Turk, Esq., to Denise Chancellor, Esq., dated October 5 and 17, 2001. As indicated therein, the Staff produced seven documents, identified seven other documents as publicly available, and identified numerous documents as withheld under a claim of privilege. The State’s assertion that the Staff identified but did not produce any documents (Motion at 1-2) is thus factually incorrect.

generally governed by the provisions of 10 C.F.R. § 2.740 *et seq.*, discovery against the Staff is governed by the provisions of 10 C.F.R. §§ 2.720(h)(ii)-(iii), 2.744 and 2.790.<sup>2</sup> These regulations establish certain limits to the Staff's obligation to respond to requests for discovery. The Presiding Officer may require the Staff to respond to interrogatories if it finds "the interrogatories are necessary to a proper decision in the proceeding and that answers to the interrogatories are not reasonably obtainable from any other source."<sup>3</sup> Similarly, a party may request the Presiding Officer to compel the Staff to produce documents, upon a showing that "the document is relevant to the issues in the proceeding; and the document is not exempt from disclosure under 10 C.F.R. § 2.790 -- or, if exempt, that the document or information is necessary to a proper decision in the proceeding and is not reasonably obtainable from another source." 10 C.F.R. §§ 2.744(c)-(d).

C. The State's Motion to Compel

In its Motion, the State identifies three areas in which it contends that further responses to its discovery requests should be compelled: (1) "the Staff's failure to respond to Requests for

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<sup>2</sup> See also 10 C.F.R. §§ 2.740(f)(3), 2.740a(j), 2.740b(a), and 2.741(e) (excluding interrogatories, depositions, and requests for documents or testimony from the Staff from the general provisions of those regulations).

<sup>3</sup> 10 C.F.R. § 2.720(h)(2)(ii). The State asserts that the Commission's procedures pertaining to Staff responses to interrogatories do not apply to requests for admission. Motion at 2, *citing Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-26, 40 NRC 93, 95 (1994). The State's reliance on the decision in LBP-94-26 is misplaced. While Judge Bloch in that proceeding held that requests for admission filed under 10 C.F.R. § 2.742 are not addressed in 10 C.F.R. § 2.720(h), and are therefore not limited thereby, he further observed that his ruling was one of "first impression." *Id.* at 95. The Staff submits that the Board's ruling in that proceeding fails to provide a basis to distinguish requests for admission from other forms of discovery, and is inconsistent with Commission decisions holding that "discovery" against the Staff stands on a different footing than discovery against other parties. See, e.g., *Pennsylvania Power and Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 323 (1980); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 NRC 85, 100 n.4 (2000) (in a 10 C.F.R. Part 2, Subpart K proceeding, "any attempt to obtain discovery materials or testimony from ACRS members, staff, or consultants is subject to the exceptional circumstances showing of 10 C.F.R. § 2.720(h)") (Bollwerk, J.; emphasis added). Indeed, because interrogatories often could easily be rewritten in the form of a request for admission, there is no sound basis to distinguish requests for admission from other forms of discovery.

Admissions and Documents relating to any proposed change to the geological and seismological characteristics for the siting and design of dry cask ISFSIs (*i.e.*, Requests for Admission No. 5-13 and 15-17; Document Requests No. 5-14),” (2) “the Staff’s responses relating to the rationale behind the grant of a seismic exemption to INEEL (Request for Admission No. 4),” and (3) “the distinction between ‘Median’ and ‘Mean’ annual probability of exceedance in Reg. Guide 1.165 (Requests for Admission Nos. 26-27).” Motion at 2. The Staff submits that its responses to these discovery requests were proper, and no further response is required.

1. Proposed Changes to the Rulemaking Plan in SECY-98-126.

The State asserts that its discovery requests in “Admissions No. 5-13 and 15-17 and Document Requests No. 5-14” sought to discover “whether the Staff was in the process of changing SECY-98-126, developing other seismic siting standards, or expediting rulemaking.” Motion at 4. The State claims that the Staff objected to such discovery on the grounds that “the requested admissions and documents were pre-decisional, and thus, privileged,” and it asserts that “the Staff must be compelled to respond because its responses are necessary to a proper decision in this proceeding and the information cannot be obtained elsewhere.” *Id.* The State’s factual assertions and arguments are without merit.

First, the production of these documentary materials, and responses to the State’s numerous requests for admission and explanation concerning these matters, is unnecessary. On October 17, 2001, the Staff produced a copy of SECY-01-0178, dated September 26, 2001 -- which sets out in detail the Staff’s proposal to modify the Rulemaking Plan in SECY-98-126.<sup>4</sup>

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<sup>4</sup> In its letter of October 17, 2001, the Staff produced a copy of SECY-01-0178, “Modified Rulemaking Plan: 10 CFR Part 72 -- ‘Geological and Seismological Characteristics for Siting and Design of Dry Cask Independent Spent Fuel Storage Installations,’” dated September 26, 2001 (which the Commission authorized for release on October 11, 2001). The Staff had previously stated its intent to propose modifications of the Rulemaking Plan in SECY-98-126. *See, e.g.*, “NRC Staff’s Brief Concerning the Licensing Board’s Referred Rulings and Certified Question in LBP-01-03 (State of Utah’s Request to Amend Contention Utah L to Challenge the Applicant’s (continued...) ”

Accordingly, the Staff has now provided the information sought by the State as to “whether the Staff was in the process of changing SECY-98-126, developing other seismic siting standards, or expediting rulemaking.”<sup>5</sup>

The State claims that the Staff’s production of the modified Rulemaking Plan in SECY-01-0178 is insufficient. It asserts that the State has been placed “at an unfair disadvantage because, based on information and belief, one of PFS’s named expert witnesses has had direct involvement in the review and/or development of changes to the rulemaking plan” (Motion at 5).<sup>6</sup> This assertion fails to establish any reason to require the production of all internal Staff documents and other predecisional information leading up to the publication of SECY-01-0178. While the Staff does not know whether PFS has obtained any information concerning developments in the Staff’s generic rulemaking process, even if the State received such information, the State would not be disadvantaged thereby. The central issue to be decided in Contention Utah L, Subpart B, is whether a sound basis exists for the Commission to approve PFS’s request for an exemption from

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<sup>4</sup>(...continued)

Seismic Exemption Request,” dated March 2, 2001, at 10 n.22; see *also*, “NRC Staff’s Response to State of Utah’s Request for Admission of Late-Filed Modification to Basis 2 of Contention Utah L,” dated November 29, 2000, at 8 n.12.

<sup>5</sup> The Staff identified, but did not produce, hundreds of predecisional or otherwise privileged documents that were created during the development of the Rulemaking Plan in SECY-98-126 and/or SECY-01-0178. The State has provided no reason to believe that the production of such privileged, predecisional materials is necessary to a proper decision in this proceeding. Moreover, inasmuch as the State’s only justification for continuing to demand the production of such materials is that it allegedly needs to learn whether and/or how the Staff plans to revise its Rulemaking Plan, its claimed need for these materials is now moot following the production of SECY-01-0178.

<sup>6</sup> See Motion at 5 (*citing* “Applicant’s Response and Objections to State’s 11th Set of Discovery” (October 2, 2001), at 9). Upon inquiry, Staff members involved in the PFS proceeding have learned that Dr. Alan Cornell, one of PFS’s named experts, also served as a member of an expert panel that was assembled by a Staff contractor for its use in reviewing the technical bases for the Staff’s Part 72 seismic rulemaking efforts. The State does not allege that Dr. Cornell disclosed any information to PFS concerning the rulemaking process, and the Staff has no knowledge that any such disclosure occurred -- but if such a disclosure did occur, it was not authorized by the Staff.

the existing seismic regulations in Part 72. That determination may require examination of the merits of the exemption request --and, under the terms of the contention, may allow the State to compare the PFS exemption request to the approach described in SECY-98-126 -- but it should not require the parties in this proceeding to litigate the history and proper course of the generic rulemaking proceeding.<sup>7</sup> Further, the Staff has produced its proposed modification of that Plan to the State -- and, therefore, there is no basis for any claim that the State is “at an extreme and unfair disadvantage in developing its case on this issue” without access to all of the Staff’s internal, pre-decisional documents concerning the development of the rulemaking approach (Motion at 5).<sup>8</sup>

In sum, the State has not shown why the production of predecisional materials related to the Commission’s generic rulemaking process is necessary to a proper decision in this proceeding, as required under 10 C.F.R. §§ 2.720(h)(2)(ii) and 2.744.<sup>9</sup>

Further, the State has failed to acknowledge in its Motion that the Staff has already responded to many of the requests for admission and document requests that are the subject of its Motion. For example:

(a) Notwithstanding its objections thereto, the Staff responded to Requests for Admission 5, 6 and 7, which sought to discover whether or not the Staff is “continuing” to

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<sup>7</sup> Significantly, the State fails to note that any proposed changes to the regulations in Part 72 must be made in accordance with the notice and comment provisions set forth in the Administrative Procedures Act, 5 U.S.C. § 553, and that the State will therefore have a full opportunity to comment on any proposed modification of the regulations prior to its finalization.

<sup>8</sup> The State indicates it “is willing to have access to the requested information and hold it as non-public information provided that the State can use the information in this proceeding” (Motion at 6). This offer, however, fails to provide the necessary basis for disclosure of this predecisional information. Indeed, any party in any proceeding could make the same offer, thereby negating the Commission’s established privilege against production of predecisional materials.

<sup>9</sup> There is no basis for the State’s assertion that “PFS is the only away-from-reactor ISFSI that is affected by these changes,” and that “[t]his is not a generic issue . . .” (Motion at 5-6). To the contrary, the Staff accepted the PFS exemption request, on a case-specific basis, fully one year ago. The Staff’s generic rulemaking efforts, in contrast, are independent from the Staff’s acceptance of the PFS exemption request, and result from the Staff’s anticipated receipt of exemption requests by other ISFSI applicants. See SECY-91-0178, at 6.

pursue rulemaking on SECY-98-126 or amendments to the seismic requirements in Part 72, by stating that the Staff had submitted to the Commission a proposed modification of SECY-98-126 (which pertains to the Part 72 seismic regulations) -- thus providing the answers sought by the State;

(b) the Staff has produced documents relating to its generic rulemaking efforts, including copies of SECY-98-126 and SECY-01-0178, which satisfy Document Requests Nos. 5-9 except to the extent that the State seeks the disclosure of pre-decisional and other privileged documents concerning the rulemaking process; and

(c) notwithstanding its objections to Document Request No. 14, concerning "the NRC's approval of PFS's use of a PSHA with a return period of 2,000 years," the Staff has produced or identified the non-privileged documents that are responsive to this centrally important request.<sup>10</sup>

Moreover, the State has altogether failed to address the Staff's other objections to this set of discovery requests, apart from its objection based on the predecisional and privileged nature of the requested information and documents. For example:

(a) The Staff objected to the State's use of vague, ambiguous and confusing language, and/or improper compound questions, in Requests for Admission 8, 13, 15, 16, and 17, and Document Requests Nos. 5-14 -- which concerns over the State's draftsmanship of its discovery requests were ignored by the State following the Staff's identification of these objections;

(b) the Staff objected to the overbroad and burdensome scope of Document Requests Nos. 5-7 and 9-13 -- which concerns were ignored by the State following the Staff's identification of these objections; and

(c) the Staff objected to the State's failure to indicate that the documents embraced within the overly broad scope of Document Requests 5-14 could not be obtained from other publicly available sources, including the Commission's Public Document Room ("PDR"), as required by 10 C.F.R. § 2.740(b)(1) -- which concern the State has not rectified.

The Staff's objections to these discovery requests should be upheld, for the reasons stated therein. The State has failed to address any of these objections, other than the Staff's objection

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<sup>10</sup> See (1) Staff Response at 19; (2) Letter from Sherwin E. Turk, Esq., to Denise Chancellor, Esq., dated October 5, 2001 (Attachment at 1, and documents enclosed therewith); (3) letter from Sherwin E. Turk to Denise Chancellor, Esq., dated March 7, 2000 (enclosing four documents pertaining to the Staff's approval of exemptions for the PFS ISFSI and the Idaho National Engineering and Environmental Laboratory (INEEL) Three Mile Island Unit-2 ("TMI-2") ISFSI, in response to the State's "Fifth Set of Discovery Requests Directed to the NRC Staff").

to producing privileged predecisional materials. Accordingly, its motion to compel fails to provide any basis to deny these objections, and its Motion should be denied.

2. The Staff's Safety Evaluation Report.

In addition to its discovery requests pertaining to the rulemaking process, the State alleges that its Twelfth Request "was also prompted by the Staff's Safety Evaluation Report ('SER'), specifically § 2.1.6, Geology and Seismicity," in which the Staff accepted PFS's use of a PSHA with a 2,000 year return period (Motion at 6). According to the State, the Staff's rationale for accepting the PFS exemption request was based in part on the prior grant of an exemption for the INEEL ISFSI, and "the relationship between the median and mean probabilities of exceeding a safe shutdown earthquake for commercial power reactors" (*Id.*). The State further asserts that information concerning the (Staff's) acceptance of the PFS exemption request is not obtainable elsewhere, and that "it is essential that the Staff respond to discovery relating to its reasoning in the SER" (*Id.*). In this regard, the State alleges that the Staff has failed to provide proper answers to its Requests for Admission Nos. 4, 26 and 27 (*Id.* at 6-7). The Staff does not agree that it has improperly failed to respond to the State's discovery requests concerning these matters.

First, the State fails to note that the Staff responded to the State's Requests for Admission 1, 2 and 3, all of which pertain to a "case study" being performed by the Staff concerning the INEEL seismic exemption -- notwithstanding the Staff's view that the case study (which seeks to examine the process rather than the merits of the INEEL exemption) is not relevant in this proceeding. See Staff Response at 5. Further, the Staff produced and/or identified numerous documents responsive to the State's document requests concerning the INEEL exemption, both in its letter of October 5, 2001 (*inter alia*, responding to Document Requests Nos. 3 and 4), and in a letter dated March 7, 2000 (producing documents in response to a previous discovery request). See n.11, *supra*. Similarly, the Staff answered Request for Admission 25, concerning the guidance for nuclear power reactors contained in Regulatory Guide 1.165. See Staff Response at 12.



Second, contrary to the State's suggestion that the Staff's objections to its Requests for Admission 4, 26 and 27 were based solely on the relevance of the questions (Motion at 7), the Staff objected to these requests due to the State's failure to frame them in a clear, unambiguous and non-argumentative manner. For example, Request for Admission No. 4 stated as follows:

REQUEST FOR ADMISSION NO. 4. Do you admit that NRC granted the ISFSI at INEEL an exemption from 10 CFR § 72.102(f)(1), in part, because without the exemption, the INEEL ISFSI would have had to meet a higher design basis standard than the one used for an existing higher-risk nuclear facility at the ISFSI host site?

The Staff objected to this request, *inter alia*, on the grounds that it (1) is vague and ambiguous in its failure to identify either the standard, the facility, or the risk referred to in the phrase "the one used for an existing higher-risk nuclear facility at the ISFSI host site," (2) is improperly argumentative, and (3) constitutes an improper compound and confusing question. In sum, this request for admission is unclear, confusing, and laden with traps for the unwary. If the State wanted to ask a question that could be answered intelligibly either "yes" or "no," it should have done so. Further, the State could have explained the intent or clarified the meaning of this request in a discussion with Staff Counsel following the Staff's objection thereto, but altogether failed to do so. Accordingly, the State's motion to compel a further response to this request should be denied.

Similarly, the Staff objected to Requests for Admission Nos. 26 and 27 for reasons going far beyond their relevance. These Requests inquired as follows:

REQUEST FOR ADMISSION NO. 26. If a nuclear power plant were to be built at the proposed PFS site, and if the design ground motions for this plant were to be determined probabilistically, do you admit that NRC Regulatory Guide 1.165 would require the design ground motions to be based on an equal hazard response spectrum with a MEDIAN annual probability of exceedance of 1.0E-5 or to an alternative reference probability developed from risk considerations?

REQUEST FOR ADMISSION NO. 27. If a nuclear power plant were to be built at the proposed PFS site, and if the design ground motions for this plant were to be determined probabilistically, do you admit that NRC Regulatory Guide 1.165 would require the design

ground motions to be based on an equal hazard response spectrum with a MEAN annual probability of exceedance of  $1.0E-5$  or to an alternative reference probability developed from risk considerations?

The Staff objected to these two requests on the grounds, *inter alia*, that they (1) are vague and ambiguous, (2) constitute impermissible and confusing compound questions, (3) constitute improper hypothetical questions which have no factual basis and call for a speculative answer, (4) are improperly argumentative, and (5) the State has not demonstrated that the information requested could not have been obtained from another source, including Regulatory Guide 1.165.

In defense of these requests, the State asserts that they "relate to whether the Staff understands the distinction between the 'median' and 'mean' annual probability of exceedance of  $1.0E-5$ . See Reg. Guide 1.165"; and it claims that there is "no legitimate justification" for the Staff's objections to these requests (Motion at 7). The Staff respectfully disagrees. If all that were required here was an answer to the question whether the Staff understands the difference between mean and median annual probabilities of exceedance, the State could have asked -- and the Staff would have answered -- that question. Instead, the State framed a pair of ambiguous, confusing, and overly complex requests for admission, which the Staff is not reasonably able to answer. Accordingly, the State's motion to compel further responses to these requests should be denied.

#### CONCLUSION

For the reasons set forth above, the Staff respectfully submits that the Licensing Board should (a) issue a Protective Order in favor of the Staff and (b) deny the State's pending motion to compel further responses to the discovery requests discussed above.

Respectfully submitted,

**/RA/**

Sherwin E. Turk  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 22nd day of October 2001

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
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PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent	)	
Fuel Storage Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION FOR PROTECTIVE ORDER, AND RESPONSE TO "STATE OF UTAH'S MOTION TO COMPEL NRC STAFF TO RESPOND TO STATE'S TWELFTH SET OF DISCOVERY REQUESTS (CONTENTION I, PART B)," in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 22nd day of October, 2001:

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