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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

PRIVATE FUEL STORAGE, L.L.C.

(Independent Spent Fuel Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

November 27, 2001

MEMORANDUM AND ORDER
(Ruling on Motion to Compel)

Pending with the Licensing Board is an October 10, 2001 motion by intervenor State of Utah (State), as amended on November 8, 2001, (1) to compel the NRC staff to respond to certain of the interrogatories and document production and admission requests contained in the State's September 18, 2001 twelfth set of discovery requests regarding contention Utah L, Part B; and (2) to compel responses by Dr. C. Allin Cornell to certain deposition questions regarding that portion of contention Utah L. See [State] Motion to Compel NRC Staff to Respond to State's Twelfth Set of Discovery Requests (Contention L, Part B) (Oct. 10, 2000) [hereinafter State Motion]; [State] Amended Motion to Compel NRC Staff To Respond to State's Twelfth Set of Discovery Requests and to Compel Dr. C. Allin Cornell to Answer Certain Deposition Questions (Contention L, Part B) (Nov. 8, 2001) [hereinafter State Amended Motion]. The staff, in responses/protective order motions dated October 22, 2001, and November 16, 2001, opposes these State requests, while applicant Private Fuel Storage, L.L.C., (PFS) in a November 16, 2001 response opposes a portion of the State's November 8, 2001 amended request seeking deposition information from Dr. Cornell, who has been

designated a PFS witness relative to contention Utah L, Part B. See 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)" (Oct. 22, 2001) [hereinafter Staff Motion Response]; NRC Staff's Motion for Protective Order, and Response to "State of Utah's Amended Motion to Compel NRC Staff To Respond to State's Twelfth Set of Discovery Requests and to Compel Dr. C. Allin Cornell to Answer Certain Deposition Questions (Contention L, Part B)" (Nov. 16, 2001) [hereinafter Staff Amended Motion Response]; [PFS] Response to [State] Amended Motion to Compel NRC Staff To Respond to State's Twelfth Set of Discovery Requests and to Compel Dr. C. Allin Cornell to Answer Certain Deposition Questions (Contention L, Part B) (Nov. 16, 2001) [hereinafter PFS Response].¹

For the reasons set forth below, the State's motion to compel (and the concomitant staff motion for protective order) are granted in part and denied in part.

A. State Admission Request Nos. 5-13, 15-17 and Document Production Request Nos. 5-14.

In its motion to compel, the State describes its Admission Request Nos. 5-13, 15-17, and Document Production Request Nos. 5-14 as designed to "determine whether the Staff is in the process of changing SECY-98-126, developing other seismic siting standards, or expediting rulemaking." State Motion at 4. As the staff points out, however, on October 17, it provided the State with a copy of SECY-01-0178, Modified Rulemaking Plan: 10 C.F.R. Part 72 -- "Geological and Seismological Characteristics for Siting and Design of Dry Cask Independent Spent Fuel Storage Installation" (Sept. 26, 2001) [hereinafter SECY-01-0178], which describes

¹ Because of recent mail delivery delays, the Board has not received hard copies of the State Amended Motion or the PFS Response. Accordingly, the citations to those documents reflect the pagination in the e-mail versions provided to the Board.

proposed staff modifications to the approved SECY-98-126 rulemaking plan.² See Staff Motion Response at 4-5.

In light of the staff's disclosure of SECY-01-0178, the information sought by State Admission Request Nos. 5-13, 15-17, seems to have been provided by the staff. Compare [State] Twelfth Set of Discovery Requests Directed to the NRC Staff (Sept. 18, 2001) at 8 (Admission Request No. 13 -- "Do you admit that NRC is expediting rulemaking to amend any section of 10 CFR Part 72 relating to geological and seismological characteristics for siting and design of dry cask [Independent Spent Fuel Storage Installations (ISFSIs)]?") with SECY-01-0178, at 6 ("The staff believes an expedited schedule for this rulemaking is appropriate."). Nonetheless, assuming the State still wants a response to one or more of these admission requests and so advises staff counsel in writing (with service by e-mail and regular mail) within seven days of the date of this order, we grant the State's motion to compel relative to Admission Request Nos. 5-13, 15-17 in that staff shall respond to these admission requests within seven days of receipt of the State's written confirmation specifying the admission requests to which the State still wants a response.³

Relative to Document Production Request Nos. 5-14, in addressing the various staff objections to these document production requests provided in its October 3, 2001 discovery answers, the State responds only to the staff argument that the State has failed to establish, in

² Subsequently, as was noted in the staff's November 20, 2001 letter to the State, the Commission in a November 19, 2001 staff requirements memorandum (SRM) indicated that it did not object to the staff's plan as outlined in SECY-01-178 to revise the SECY-98-126 rulemaking plan and placed a suspense date of March 22, 2002, on submission of a proposed rule to the Commission.

³ With SECY-01-0178 now in the hands of the State, rather than providing a basis for refusing to respond to an admission, the staff's various objections to the form of these admission requests seemingly are pertinent elements as it assesses whether to provide an affirmative (or negative) response to the admission requests, with any additional explanation.

accordance with 10 C.F.R. § 2.744(c)-(d), that the document or information is necessary to a proper decision in the proceeding and is not reasonably obtainable from another source. In this regard, the State declares such information is necessary in that (1) a staff change in seismic standards under Part 72 or an expedited rulemaking may be used procedurally in litigating Utah L; and (2) the staff may revise its rationale for recommending that PFS be granted a seismic exemption by relying on the Part 72 changes or the rulemaking plan modification. Further, noting staff counsel's representation that the staff would make the modified rulemaking plan available when approved by the Commission -- which the staff subsequently did -- the State asserts that one of the witnesses named by PFS as a potential technical expert has had direct involvement in the review and/or development of changes to the rulemaking plan, giving PFS unfair access to information regarding the review and development of the revised Part 72 rulemaking plan that, as a practical matter, is non-generic relative to the PFS facility.

At this juncture, given the agency's general authority to proceed by either rulemaking or adjudication, see Power Authority of the State of New York (James A FitzPatrick Nuclear Power Plant, Indian Point, Unit 3), CLI-01-14, 53 NRC 488, 557 n.259 (2001), and the staff's provision of SECY-01-178 to the State, we find only the third concern about "unfair access" is sufficient to provide a basis for granting the State's motion relative to these productions requests.⁴ And in

⁴ In this regard, we note that although Document Production Request No. 14 appears to constitute an appropriate production request relative to contention Utah L, Part B, the staff's October 5, 2001 response to this request indicated that it was responding to that request by providing documents, subject to any specified claims of privilege. See NRC Staff's Objections and Responses to the "State of Utah's Twelfth Set of Discovery Requests Directed to the NRC Staff" (Oct. 3, 2001) at 18-19. The staff's October 5, 2001 privilege log relative to the State's twelfth discovery request does not, however, identify any withheld documents that appear pertinent to this production request, see Letter from Sherwin E. Turk, NRC Staff Counsel, to Denise Chancellor, State Counsel (Oct. 5, 2001) encl. [hereinafter Staff October 5 Production Log], and the State has not asserted that any of those documents would, in fact, be subject to disclosure in connection with that specific production request.

this regard, for the reasons and under the conditions set forth in section C below, we grant the State's motion as it relates to information disclosure relevant to this aspect of its request.⁵

B. State Admission Request Nos. 4, 26-27

State Admission Request Nos. 4, 26-27, which seek admissions regarding the basis for a previous NRC granted seismic exemption and the possible mean and median annual probabilities of exceeding 1.0E-5 for a nuclear power plant built on the proposed PFS ISFSI site, are the subject of staff objections as, among other things, vague, argumentative, compound, and calling for speculation. In this instance, the staff's objections are more properly the basis upon which to fashion an affirmative or negative answer to the State's question, with any additional explanation. Accordingly, the State motion to compel is granted relative to Admission Request Nos. 4, 26-27, in that the staff shall have seven days from the date of this order within which to file an answer to these admission requests.

C. Dr. Cornell's Deposition Testimony

The genesis of this dispute is an October 31/November 1, 2001 State deposition of PFS witness Cornell during which staff counsel interposed objections to questions directed to Dr. Cornell, claiming the information sought was protected by the deliberative process privilege. Both the State and the staff agree that Dr. Cornell served on a committee that provided input to an NRC contractor that was responsible for providing the staff analysis and advice concerning a technical basis for the modified rulemaking plan that was presented to the Commission in SECY-01-0178. Their disagreement is over what information Dr. Cornell should provide regarding that rulemaking. According to the State, it should be able to depose Dr. Cornell

⁵ In connection with the State's "unfair access" concern, although its Document Production Request Nos. 10 and 11 do seek lists of persons who could have been involved in the rulemaking plan revision at issue, it seemingly is aware of the identify of the PFS expert witnesses relative to contention Utah L, Part B, so as to make its request moot.

regarding (1) “technical information about ISFSIs that he received from the staff in the course of his consulting work”; and (2) “substantive information he received in the course of his consulting work for NRC . . . that he considered in forming his opinion on the appropriateness of PFS’s request for an exemption.” State Amended Motion at 7, 8. The staff, on the other hand, asserts that the State is “seeking to discover privileged, pre-decisional information contained in communications between the Staff, its contractor, and/or subcontractors as part of the generic rulemaking efforts, that were not shown to be connected to Dr. Cornell’s expert opinions in this proceeding.” Staff Amended Motion Response at 4. According to the staff, during the deposition the State had an opportunity to delve both into the question of what information was afforded to PFS by Dr. Cornell relative to his rulemaking plan revision-related work as a staff subcontractor and what information he gained as a subcontractor that he utilized in formulating his expert opinion in this proceeding, so that no further discovery is warranted at this juncture. PFS likewise declares that, given its failure during the deposition to elicit any information from Dr. Cornell indicating that he utilized purportedly privileged information in formulating his opinion about the appropriateness of using a 2000-year return period earthquake as the design basis for the proposed PFS ISFSI facility, the State’s motion to compel should be denied. See PFS Response at 2-3.

As a general proposition, we agree with the staff that documentary material and the deposition testimony of Dr. Cornell as it relates to the information and activities generated by the contractor effort to provide a technical basis in support of a possible revision to the SECY-98-126 rulemaking plan and/or an associated regulatory guide to permit the incorporation of a design basis 2000-year return period earthquake would properly be subject to a deliberative process privilege claim. It also is apparent, however, that such a privilege is a qualified one that is subject to a judicial inquiry and determination regarding the interests of the

litigants, society's interest in accuracy and integrity of factfinding, and the public's interest in honest and effective government. See Texaco Puerto Rico, Inc. v. Department of Consumer Affairs, 60 F.3d 867, 885 (1st Cir. 1995). In this instance, as the State suggests relative to its "unfair access" claim, a particular set of circumstances exist that counsels very close scrutiny of the staff's deliberative process privilege claim, i.e., an individual designated as a PFS expert witness relative to the contention at issue was involved in the revision process relating to the rulemaking plan, has admitted providing information to PFS regarding that process, and has admitted that information he gained as a result of his involvement in that process influenced his opinions regarding the PFS exemption request to utilize a 2000-year return period earthquake. See State Amended Motion at 9-11

Assuming the State has made a sufficient showing that supposedly predecisional information is implicated relative to the State's claims regarding unfair access to information in connection with the matters at issue in contention Utah L, Part B, given the particular circumstances here, a balancing of the pertinent factors, in particular the public interest in factfinding integrity and in fair and effective government clearly support making such otherwise privileged information available to the State (as well as demonstrate the overriding need/decisional necessity of the information) to the degree that it (1) is information Dr. Cornell transferred to PFS; or (2) concerns the bases for Dr. Cornell's purported expert opinions concerning the PFS exemption request regarding the appropriate design basis earthquake for its proposed ISFSI facility. In addition, supporting possible information disclosure relative to the first matter is Dr. Cornell's admitted disclosure to applicant PFS of information relating to the rulemaking revision process, which seemingly would negate the privilege in the context of

intervenor State's discovery request.⁶ Cf. In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982) (voluntary disclosure to third party to gain litigation advantage waives attorney-client privilege).

Being footed in a concern about "unfair access," the State's showing in this instance necessarily should be one that reflects a connection between Dr. Cornell's activities/knowledge as a staff subcontractor and his activities/knowledge as a PFS witness. In this instance, the State has made a proffer that, when taken in conjunction with the Staff October 5 Production Log and the staff's November 16, 2001 post-deposition discovery response listing a number of purportedly privileged documents that were provided to contract consultants like Dr. Cornell in connection with the potential Part 72 rulemaking plan/regulatory guide revisions, see NRC Staff's Objections and Responses to the "State of Utah's Thirteenth Set of Discovery Requests Directed to the NRC Staff" (Nov. 16, 2001) unnumbered attach.; see also NRC Staff's Objections and Responses to the "State of Utah's Fourteenth Set of Discovery Requests Directed to the NRC Staff" (Nov. 16, 2001) at 15, provides sufficient cause to afford an additional, albeit limited, opportunity for the State to question Dr. Cornell.⁷

⁶ Although Dr. Cornell seemingly had a contractual responsibility not to reveal any information regarding his Part 72 rulemaking-related activities without permission from the staff, see Staff Amended Motion Response at 8, Dr. Cornell's alleged breach of his duty to the staff seemingly would not bar State discovery of Part 72 rulemaking-related information that Dr. Cornell revealed to applicant PFS or that forms the basis of the analysis he will provide on behalf of PFS. This is not to say, however, that in other circumstances involving the release or utilization of staff confidential information without staff permission, such as an inadvertent disclosure to an uninvolved nonparty, the deliberative process privilege would be invalidated so as to permit discovery disclosure of that information to a party to a proceeding.

⁷ Although the staff and PFS both assert that Dr. Cornell's deposition testimony establishes that the rulemaking-related information he relied upon in forming his analysis of the PFS application ultimately was publically available information, see Staff Amended Motion Response at 9; PFS Response at 2, we note that Dr. Cornell's answer in this regard begins with the qualifying phrase "For example," November 1, 2001 Deposition of Dr. C. Allin Cornell at 69.

Accordingly, we grant the State's motion to compel, as amended, subject to the following conditions:

1. On or before Friday, December 14, 2001, at a time and place mutually agreed to by PFS, the staff, and the State, the State shall be afforded an additional opportunity to depose Dr. Cornell in connection with two subjects relating to his involvement as an expert panel member in the NRC's rulemaking efforts to revise 10 C.F.R. Part 72 to allow ISFSI applicants to rely upon a probabilistic seismic hazard analysis in establishing facility seismic design bases: (a) what documentary or other information did he provide to PFS, including PFS counsel or any PFS officers, employees, or contractors, regarding this NRC Part 72 rulemaking effort; and (b) the bases for his purported expert opinions regarding the matters at issue in connection with contention Utah L, Part B, to the extent his analysis is based on or influenced by documentary or other information to which he had access as a result of his participation in this NRC Part 72 rulemaking effort.
2. In the context of his deposition, any documentary information relating to this NRC Part 72 rulemaking effort subject to a staff deliberative process privilege claim that Dr. Cornell identifies as (a) having been revealed to PFS; or (b) forming/influencing the basis for his purported expert opinion regarding the appropriate design basis earthquake for the PFS facility shall be provided to the State, subject to any protective order agreement arrived at between the parties.⁸ In this regard, the staff should be prepared to provide to Dr. Cornell for his review copies of the Part 72 rulemaking documents that the staff has identified as subject to a deliberative process privilege claim if circumstances arise in which Dr. Cornell needs to refresh his recollection regarding the material to which he may have had access.

Additionally, given the potential relevance of this information to the pending November 9, 2001 PFS motion for summary disposition regarding contention Utah L, Part B, the State shall have seven days from the date upon which Dr. Cornell's additional deposition is concluded, but in any event no later than Friday, December 21, 2001, within which to file any

⁸ If the staff has interposed a basis for document nondisclosure other than the predecisional deliberative process privilege (e.g., attorney work product or attorney-client privilege) and still wishes to protect the document from disclosure on those additional grounds, it should file a motion for protective order within five days of the conclusion of Dr. Cornell's deposition providing a detailed justification in support of nondisclosure.

deposition-related supplement to its PFS motion response/reply to any staff response in support of the PFS motion, which shall not exceed ten pages in length.⁹

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD¹⁰

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

November 27, 2001

⁹ Under the schedule set forth above, if the date for the State's deposition-related supplement falls before the due date for its reply to any staff response in support of the pending PFS dispositive motion regarding contention Utah L, Part B, the due date for its deposition-related supplement will be extended to coincide with the filing due date for its reply (which can be submitted with the supplement as a consolidated filing).

¹⁰ Copies of this memorandum and order were sent this date by Internet e-mail and/or facsimile transmission to (1) applicant PFS; (2) intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	
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 the foregoing LB MEMORANDUM AND ORDER (RULING ON MOTION TO COMPEL) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 27th day of November 2001