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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF REGULATORY
RULEMAKING AND
ADJUDICATIONS STAFF

In the Matter of:)	
)	Docket No. 72-22-ISFSI
)	
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	January 18, 2000

**STATE OF UTAH'S MOTION TO COMPEL APPLICANT TO RESPOND TO
STATE'S EIGHTH SET OF DISCOVERY REQUESTS**

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 interrogatories and requests for admissions propounded in State of Utah's Eighth Set of Discovery Requests Directed to the Applicant (December 29, 1999) ("State's Discovery Requests"). This Motion to Compel relates to Utah Contention E (Financial Assurance) and Utah Contention S (Decommissioning) and is supported by the Declaration of Dr. Michael Sheehan,¹ attached hereto as Exhibit 1.

FACTUAL BACKGROUND

The State submitted its "Eighth Set of Discovery Requests Directed to the Applicant (Utah Contentions E & S)" on December 29, 1999. PFS responded with

¹ Dr. Sheehan's curriculum vitae, publications and prior testimony were attached as Exhibit 2 to State's Objections and Response to Applicant's Second Set of Discovery Requests with respect to Groups II and III Contentions, submitted June 28, 1999.

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"Applicant's Objections and Responses to State of Utah's Eighth Set of Discovery Requests" dated January 11, 2000.² The State sent PFS a letter on January 14, 2000, setting forth the basis of the State's concerns regarding the deficiency of PFS's responses. See State's January 14, 2000 letter,³ attached hereto as Exhibit 2. The State and PFS have been able to resolve some issues but not all of them. The issues left unresolved relate to marketability/financial qualifications and PFS's failure to fully answer interrogatories describing documents PFS claims it has produced to the State.

1. Discovery Related to Financial Qualifications

The State propounded two interrogatories and one request for admission related to PFS's financial qualifications, and to the market for spent nuclear fuel storage.

Contention E, Interrogatory No. 5 requested information about current and potential competitors for PFS. Contention E, Interrogatory No. 9 requested information about the identity of individuals responsible for developing and approving PFS's business plan, for preparing its budget, for preparing a marketing plan or strategy, and for developing and deciding upon a facility construction schedule. Contention E, Request for Admission No. 5 requested an admission that PFS has not raised sufficient capital to begin construction of the facility in September 2000.

² While the State may cite to proprietary pleadings in this Motion, nothing herein contains information claimed by PFS as proprietary.

³ This January 14th letter was inadvertently mis-dated as January 12, 2000. In addition, the State has redacted certain information from this letter that PFS may claim as proprietary.

As it has in the past, PFS refused to respond to these requests on grounds of relevance, relying on its proposal to demonstrate its financial qualifications through its compliance with license conditions. Again, the State and PFS have a fundamental disagreement about the scope of PFS's response.

The factual background set forth in the State of Utah's December 14, 1999 Motion to Compel Applicant to Respond to State's Fourth Set of Discovery Requests is also pertinent to this Motion, and is incorporated herein by reference. See December 14, 1999 Motion to Compel at 1-3. Since that Motion was filed, the State has also filed a Response to Applicant's Motion for Partial Summary Disposition of Contention E, dated December 27, 1999. The Response outlines the State's position that PFS may not simply rely on license conditions to comply with financial qualification regulatory requirements.

The State has contacted counsel for the Applicant about these matters, both by letter and by telephone. Given the Applicant's pending Summary Disposition Motion on nine of the ten admitted bases for Contention E, there is no possibility of the State and PFS resolving their dispute at the current time.

2. Document Identification Interrogatories

In its responses to the State's November 19, 1999 Fourth Set of Discovery Requests Directed to the Applicant and Skull Valley Band of Goshutes with Respect to Group II Contentions, PFS indicated that it had already provided to the State all relevant documents responsive to the following document requests: (a) copies of reports or studies

by utilities or others in PFS's possession or control dealing with the economics of the spent nuclear fuel storage market (Applicant's Objections and Responses to State of Utah's Fourth Set of Discovery Requests... (*Proprietary Version*) dated December 6, 1999, at 13 (Contention E, Document Request No. 7); (b) documents describing or analyzing the costs of operating proposed or existing ISFSIs at locations other than PFS (*id.*, at 19 (Contention E, Document Request No. 20)); and (c) documents discussing the methodologies, plans, or procedures for decontaminating and/or decommissioning an ISFSI within the U.S. (*id.*, at 38 (Contention S, Document Request No. 13). It did not further identify the requested documents.⁴

In a response to another Document Request in the same December 6, 1999 Objections and Responses, PFS objected to a portion of the request that asks "[i]f any documentation has already been provided in whole or in part, please identify the documents involved by name so that your responses can be associated with this document

⁴ For example, in response to Contention S, Document Request No. 13, which stated:

Provide any documents that discuss the methodologies, plans, or procedures for decontaminating and/or decommissioning and ISFSI within the U.S.[,]

PFS responded:

PFS has produced to the State all such documents in its possession, custody, or control at its repository of documents maintained in Salt Lake City at Parsons Behle & Latimer. PFS will notify the State upon updating its repository of documents maintained at Parsons Behle & Latimer.

request." PFS stated that "such request is an interrogatory, not a request for document production," *id.*, at 33, and went on to state:

A request for document production under 10 C.F.R. § 2.741 allows a party to serve on any other party a request to:

- (1) Produce and permit the party making the request . . . to inspect and copy any designated documents . . . which are in the possession, custody, or control of the party upon whom the request is served;

10 C.F.R. § 2.741(a)(1)(emphasis added). PFS has produced the documents requested by the State and has allowed it to inspect and copy them. Nothing further is required of PFS in response to a request for document production.

By contrast, an interrogatory may be used to request a party to identify pertinent documents, tangible things, or the identity of persons with knowledge of the facts relevant to the action. . . . Here the State is asking PFS to identify . . . the documents it has requested and which PFS has already produced. This request is properly the subject of an interrogatory, not a request for the production of documents.

Id. at 33 (Applicant's Response to Contention S, Document Request No. 2).

In consideration of PFS's position, the State used two of its allotted ten interrogatories to PFS in its Eighth set of Discovery Requests to PFS asking PFS to identify (a) reports or studies by utilities or others in its possession or control dealing with the economics of the spent nuclear fuel storage market (Utah Contention E, Interrogatory No. 7), (b) documents describing or analyzing the costs of operating proposed or existing ISFSIs at locations other than PFS (Utah Contention E, Interrogatory No. 8), and documents discussing the methodologies, plans, or procedures for decontaminating and/or decommissioning an ISFSI within the U.S. (Utah Contention

S, Interrogatory No. 5). PFS responded to each of the interrogatories by objecting and then provided a partial answer, stating that the documents PFS has produced to the State "include the following . . ." *Id.*, at 7, 8, and 17 (emphasis in original).

In trying to resolve this particular dispute, PFS was not prepared to state that its interrogatory answers represented the bulk of the pertinent documents produced to the State. *See* Exh. 2, numbered item 2.

ARGUMENT

I. THE ARGUMENTS SET FORTH IN THE STATE OF UTAH'S DECEMBER 14, 1999 MOTION TO COMPEL APPLY EQUALLY TO PFS'S LATEST REFUSAL TO ANSWER DISCOVERY.

In its December 14, 1999 Motion to Compel, the State argued that PFS should be compelled to respond to discovery relative to financial qualifications and marketing information because the scope of allowable discovery is broad, and because the discovery sought is relevant to admitted bases. *See* December 14, 1999 Motion to Compel at 3-6. The State also requested that the Board rule on the State's Motion to Compel at the time it rules on the Applicant's Partial Motion for Summary Disposition, and that the State be given sufficient time to complete discovery on all the issues remaining in Contention E. *See* December 14, 1999 Motion to Compel at 9-10. These arguments and requests apply equally to PFS's latest refusal to answer discovery relative to financial qualifications and marketability, and are incorporated herein by reference.

1. Contention E, Interrogatory No. 5 and Request for Admission No. 5

Private Fuel Storage, LLC, has no independent assets and must rely on Service Agreements, debt financing or other means to raise funds to construct and operate its proposed facility. Admitted Basis 2 for Contention E states:

PFS is a limited liability company with no known assets; because PFS is a limited liability company, absent express agreements to the contrary, PFS's members are not individually liable for the costs of the proposed PFSF, and PFS's members are not required to advance equity contributions. PFS has not produced any documents evidencing its members' obligations, and thus, has failed to show that it has a sufficient financial base to assume all obligations, known and unknown, incident to ownership and operation of the PFSF; also, PFS may be subject to termination prior to expiration of the license.

See also, Contention E, Bases 7 and 8.

Interrogatory No. 5 asks PFS to identify current and potential competitors.⁵ This information is essential to an inquiry about the marketability of the Service Agreements upon which PFS will be relying for funding. Request for Admission No. 5 requests an admission that PFS has not, to date, raised sufficient capital to begin construction in September 2000. This information is directly relevant to PFS's financial qualifications.

2. Contention E, Interrogatory No. 9

Contention E, Interrogatory No. 9 requested information about the identity of individuals responsible for developing and approving PFS's business plan, for preparing

⁵ It should be noted that PFS has justified treating documents and pleadings as confidential based on the "competitive harm" such disclosure would create. *See e.g., Affidavit of John D. Parkyn Pursuant to 10 C.F.R § 2.790 Regarding Applicant's Motion for Partial Summary Disposition of contention Utah E/Confederated Tribes F*, dated December 2, 1999.

its budget, for preparing a marketing plan or strategy, and for developing and deciding upon a facility construction schedule. First, Interrogatory No. 9 is directly relevant to which individuals at PFS the State may need to depose. Second, the identity of the individuals responsible for preparing and approving a marketing plan or strategy and a business plan is pertinent to an inquiry about the marketability of PFS's Service Agreements, and is therefore relevant for the reasons described above. Third, the identity of the individuals responsible for preparing and approving a business plan, a budget, and a construction schedule is relevant to the adequacy of PFS's budget, and is therefore relevant to Basis No. 6:

The applicant has failed to show that it has the necessary funds to cover the estimated costs of construction and operation of the proposed ISFSI because its cost estimates are vague, generalized, and understated. See 10 C.F.R. Part 50, App. C, § II.

It should be noted that this Basis is not even included in PFS's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F, dated December 3, 1999 at 4.

II. The State Is Entitled to Specific Responses to its Interrogatories as to the Identity of Documents PFS Has Produced.

Initially, the State made requests for production of documents on the subjects described above in the Factual Background, Part 2. PFS responded generally that the documents had been produced at its Parsons Behle & Latimer repository in Salt Lake City. We reviewed those documents and did not find them to be responsive. Because the

State believes the answers to these questions are critical to its case, it then used some of its ten allotted interrogatories to elicit more responsive answers from the Applicant. PFS responded to each of the interrogatories by objecting and then provided a partial answer, stating that the documents PFS has produced to the State "include the following . . ." *Id.*, at 7, 8, and 17 (emphasis in original). The State proposed a resolution to this dispute, suggesting that PFS state that its interrogatory answers represented the bulk of the pertinent documents produced to the State. *See* Exh. 2, numbered item 2. PFS was unwilling to do so.

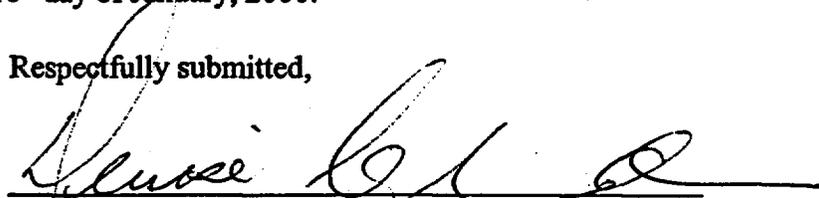
As PFS itself has acknowledged, a request to identify documents that have already been produced is "properly the subject of an interrogatory. . . ." Applicant's Objections and Responses to State of Utah's Fourth Set of Discovery, dated December 6, 1999, at 33. Asking PFS to identify documents that it has within its control and that it has already identified as relevant is not independent research. Instead, it is a request to reveal information within a party's possession and control. According to the Commission, "[a] sufficient answer to such an interrogatory is the location, title, and a page reference to the relevant document." Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,174 (1989). The State is asking for no more.

CONCLUSION

For the foregoing reasons, the Applicant's legal argument for not responding to the State's eighth set of discovery requests on Contentions E and S, as described above, are without merit. Therefore, PFS should be ordered to answer the discovery.

DATED this 18th day of January, 2000.

Respectfully submitted,



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Diane Curran, Special Assistant Attorney General
Laura Lockhart, Assistant Attorney General
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EXHIBIT 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	Docket No. 72-22-ISFSI
)	
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	January 18, 2000

DECLARATION OF MICHAEL F. SHEEHAN, Ph.D.

I, Michael F. Sheehan, declare under penalty of perjury and pursuant to 28 U.S.C. § 1746, that I assisted the State of Utah in preparing discovery requests to the Applicant, and that the statements contained in State of Utah's January 18, 2000 Motion to Compel Applicant to Respond to State's Eighth Set of Discovery Requests, relating to Utah Contention E, are true and correct to the best of my knowledge, information and belief.

Executed this 18th day of January 2000.

By: 

Michael F. Sheehan, Ph.D.

EXHIBIT 2

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



JAN GRAHAM
ATTORNEY GENERAL

JAMES R. SOPER
Solicitor General

REED RICHARDS
Chief Deputy Attorney General

January 12, 2000

Paul Gaukler, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington DC 20037-1128

Via E-mail and First Class Mail

re: State's Proposed Motion to Compel PFS to Respond to
State's Eighth Set of Discovery Requests (Contention E)

Dear Paul:

As generally discussed earlier this week and as I advised in my voice message to you today, I advised you that the State intends to file a Motion to Compel discovery on PFS's failure to respond to those discovery requests in which PFS argued that it need not legally respond to marketability-related issues or to issues related to its financial qualifications. As I have indicated in our previous correspondence relating to other Motions to Compel answers to PFS's responses to discovery on Utah Contention E and also in the State's December 27, 1999, Response to PFS's December 7, 1999 Motion for Summary Disposition for Utah Contention E, and in State's January 10, 2000 Reply to Staff, the State does not agree that it is legally sufficient for PFS to rely only on license conditions to meet the financial assurance requirements. The State believes PFS is required to demonstrate during the licensing proceeding that it is financially qualified to construct and operate the proposed facility. In addition, because PFS's ability to obtain adequate financing is dependent upon its ability to market storage space, marketability is also relevant.

As you are aware, the State and PFS tried unsuccessfully to resolve PFS's refusal to answer similar discovery requests directed to PFS by the State in the past. We recognize that PFS is likely to continue to have a legal disagreement with the State about these matters and that we will not be able to reach resolution of the issues until after a decision on summary disposition is rendered. To protect the State's interests, the State intends to file a

Motion to Compel PFS to answer the discovery requests PFS refused to answer. As we did previously, the State also intends to request in its Motion to Compel that should the Board grant the State's motion, the State not be constrained by the limitation of using no more than four interrogatories after December 31, 1999 because the Summary Disposition Motion will not be decided until some time this month or later. We are also likely to request additional time for discovery on any and all issues that arise as a result of any discovery PFS produces following the Board's decision.

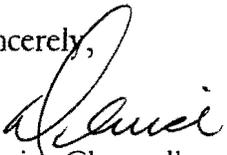
Specifically, the State expects to file a motion to compel with respect to the following areas:

1. Marketability-Related, Contention E: Request for Admission No. 5, Interrogatory No. 5 and Interrogatory No. 9. The issues are the same as in our present motion to compel before the Board.
2. The scope of "include" in PFS's responses to Contention E, Interrogatories No. 7 and 8, Contention S. Interrogatory No. 5. PFS objected to responding to document requests naming specific documents that PFS had produced about a particular issue, arguing that the State must send an interrogatory to obtain this specific information. The foregoing three interrogatories are in response to PFS's objections. In its current discovery response, PFS states: "the documents PFS had produced to the State include the following documents..." (emphasis in original). While I understand that PFS may not want to categorically state all the documents PFS may have produced, I am concerned that "include" may be read narrowly. If the word "includes" means that, to date, the documents listed are the bulk of the documents that PFS has produced to date and that PFS will timely supplement this interrogatory if it produces more documents, then the word "include" may be satisfactory. On the other hand, if "include" means that PFS is giving the State an "example" of what it has produced then it is an inadequate response.
3. Contention E, Document Request No. 2. The State believes that whatever is in the business plan is relevant and requests the redacted pages be produced
4. Contention E, Document Requests No. 3 and 12. The State believes that PFS has not produced documents that show the basis for how PFS arrived at the calculated figure for insurance (i.e. \$200 million liability insurance and redacted in off-site property insurance).
5. Contention S, Interrogatory No. 7. Currently, PFS appears to have no

documents responsive to this interrogatory except the license application. The State requests that responsive documents be produced prior to the scheduled deposition of the State's expert, David Schlissel (tentatively scheduled for the week of January 24) in time for him to review the documents prior to his deposition.

6. Contention S, Document Request No. 1. PFS's response is inadequate. To the extent that PFS will rely on NRC documents, it must tell the State the name of the NRC documents. The State agrees that PFS need not actually produce publically available NRC documents.

I am sorry I was unable to speak with you by phone today but I believe the above should alert you to the State's concerns. I do not intend to file a Motion to Compel until Tuesday, January 18, 2000, and hope to speak with you about these matters before then.

Sincerely,

Denise Chancellor
Assistant Attorney General

cc: Sherwin Turk, Esq., NRC, Office of General Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S MOTION TO COMPEL

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APPLICANT TO RESPOND TO STATE'S EIGHTH SET OF DISCOVERY

REQUESTS was served on the persons listed below by electronic mail (unless otherwise

noted) with conforming copies by United States mail first class, this 18th day of January,

2000:

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