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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF GENERAL COUNSEL
REGULATORY AND
ADJUDICATION STAFF

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
FOURTH SET OF DISCOVERY REQUESTS (CONTENTION E)"

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.730(c) and 2.740(c), NRC Staff ("Staff") hereby requests (a) that the Atomic Safety and Licensing Board ("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 answers to the "State of Utah's Fourth Set of Discovery Requests Directed to the NRC Staff (Utah Contention E)" ("Fourth Requests"), dated January 13, 2000, and (b) that the Licensing Board deny the "State of Utah's Motion to Compel NRC Staff to Respond to State's Fourth Set of Discovery Requests (Contention E)" ("Motion to Compel"), dated February 4, 2000.

In support of this request, the Staff submits that it has attempted to respond to the State's Fourth Requests in a positive and cooperative manner; and that the Staff properly responded, in part, and objected, in part, to the State's Fourth Requests, as set forth in the "NRC Staff's Objections and Responses to the 'State of Utah's Fourth Set of Discovery Requests Directed to the NRC Staff (Utah

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Contention E)" ("Staff Response"), dated January 28, 2000. Further, as more fully set forth below, the Staff submits that certain of those Requests -- which are the subject of the State's Motion to Compel -- are unduly oppressive and improper. Accordingly, for the reasons more fully set forth below, the Staff respectfully submits that it is entitled to a protective order pursuant to 10 C.F.R. § 2.740(c), to protect the Staff from having to respond further to the State's Fourth Requests; and that the State's motion to compel further responses to its Fourth Requests should be denied.

DISCUSSION

The instant discovery dispute pertains to the State of Utah's fourth set of discovery requests to the Staff, concerning Contention Utah E/ Confederated Tribes F ("Financial Assurance"). In that contention, the State generally contends that Private Fuel Storage, L.L.C. ("PFS" or "Applicant") has failed to demonstrate the financial qualifications required by 10 C.F.R. §§ 72.22(e) and 72.40(a)(6), and that its application for an Independent Spent Fuel Storage Installation ("ISFSI") should therefore be denied. *See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 187, 251-52 (1998)*

The State, in its Fourth Requests to the Staff, filed 57 requests for admission, six interrogatories, and 20 document requests -- *i.e.*, 83 separate discovery requests. On January 28, 2000, the Staff filed its Objections and Responses to the State's Fourth Requests, in which the Staff provided answers to a large number of those requests, but objected to certain requests as improper under the Commission's regulations governing discovery. After reviewing the Staff's Responses and discussing the Staff's objections with Staff Counsel, the State has now moved to compel further responses to ten of its 83 discovery requests: Thus, the State seeks further responses to Request for Admission 16 (concerning every other ISFSI that has been licensed to a utility under Part 72);

Requests for Admission 24-29 (concerning the legal standards that apply, and hazards posed by the Louisiana Energy Services, L.P. ("LES") fuel enrichment facility); Requests for Admission 44 and 46 (complex questions concerning the conditions under which debt financing might not be available to PFS), and Request for Admission 36 (a compound question concerning inter-customer liability). *See* Motion at 2. The Staff submits that these requests for admission are improper, and that the Staff should not be required to answer these requests, for the reasons set forth below.

A. Request for Admission 16 – All Other (Utility) Licensees.

The State's Request for Admission No. 16 was as follows:

REQUEST FOR ADMISSION NO. 16. Please refer to Staff's Position page 3, Item 2, ¶4: **Do you admit that for every other ISFSI licensed to a utility under Part 72, the utility-owner has made the required showing under 10 CFR 72.22(e) prior to the issuance of a license by the NRC.**

Id.; emphasis added. The Staff objected to this request on the grounds, in part, that it (a) seeks information that is not relevant to Utah Contention E and is not reasonably calculated to lead to the discovery of admissible evidence, and (b) is unduly burdensome in its request for information concerning every other ISFSI licensed to a utility under Part 72. Staff Response at 10.

While the State asserts that it wishes to learn "what the Staff has allowed in the past for other [utility] Part 72 licensees" (Motion at 6), the requested information is irrelevant since the only proper issue in this proceeding is whether PFS satisfies Commission regulations; that determination requires an evaluation of PFS' proposal, and does not depend on how other licensees may have satisfied Commission regulations. In addition, this request is further irrelevant in that it pertains only to utility licensees, whose financial qualifications and individual need for ISFSI storage capacity may well be different from those of PFS, which intends to market its facility to other users.

Moreover, this request presents an undue and unnecessary burden on Staff resources, since the State already has access to the requested information: The State admits that it has compiled a list of ISFSIs licensed by the Staff¹ -- and if the State truly believes the information sought in this request is necessary for its case, it has shown no reason why it cannot independently research the financial qualifications of the other Part 72 licensees by examining the dockets for those facilities. It would be unreasonable and unduly burdensome on Staff resources for the Staff to be required to conduct this research on the State's behalf; further, the Staff is not required under the Commission's regulations to conduct this research for the State inasmuch as the requested information is not "necessary to a proper decision in the proceeding" and, in any event, is "reasonably obtainable" by the State from other sources. *See* 10 C.F.R. §§ 2.720(h)(2)(ii).²

¹ The Staff had offered to provide a list of NRC-licensed ISFSIs to the State, in an effort to resolve this issue; this offer was not accepted by the State.

² As the Staff observed in its general objections to the State's Fourth Requests (Responses at 1-3), 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 generally governed by the provisions of 10 C.F.R. § 2.740 *et seq.*, interrogatory and document discovery against the Staff is governed by the provisions of 10 C.F.R. §§ 2.720(h)(ii)-(iii), 2.744 and 2.790. *See also* 10 C.F.R. §§ 2.740(f)(3), 2.740a(j), 2.740b(a), and 2.741(e) (excluding discovery from the Staff from the general provisions of those regulations). These regulations establish certain limits to the Staff's obligation to respond to requests for discovery. For example, the Commission's rules provide that the Presiding Officer may require the Staff to respond to interrogatories upon a finding that "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". 10 C.F.R. § 2.720(h)(2)(ii). With regard to requests for the production of documents, the Commission's rules similarly provide, in part, that a party may request the Presiding Officer to compel production of the 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).

(continued...)

B. Requests for Admission 24-29 -- the LES Facility.

The State's Requests for Admission Nos. 24-29 were as follows:

REQUEST FOR ADMISSION NO. 24. Please refer to Staff's Position Item 2, page 4, ¶2: Do you admit that the PFS proposal differs from the LES (*see Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997) ("LES")*) proposal in that, unlike Part 70, Part 72 requires reasonable assurance that the applicant will have the necessary funds to cover estimated operating costs over the planned life of the facility.

REQUEST FOR ADMISSION NO. 25. Please refer to Staff's Position Item 2, page 4, ¶2 (references to the LES decision): Do you admit that the PFS proposal differs from the license proposed for LES in that at no time would a particular unit of Special Nuclear Material ordinarily be stored at the LES facility for more than a single production and shipping cycle.

REQUEST FOR ADMISSION NO. 26. Please refer to Staff's Position Item 2, page 4, ¶2 (references to the LES decision): Do you admit that the PFS proposal differs from the LES proposal in that at no time (except during start-up and decommissioning of PFS), would the volume of Special Nuclear Material ("SNM") at LES approach the volume of SNM stored at PFS in the base case.

REQUEST FOR ADMISSION NO. 27. Please refer to Staff's Position Item 2, page 4, ¶2 (references to the LES decision): Do you admit that the PFS proposal differs from the LES proposal in that any particular unit of Special Nuclear Material would ordinarily be at the

²(...continued)

Moreover, as the Staff further indicated (Responses at 3-4), the State has not complied with the Commission's requirements governing discovery against the Staff. The State has not indicated that the requested information and documents are exempt from disclosure under 10 C.F.R. § 2.790 or that it can not obtain the documents from public sources. Similarly, to the extent that any documents may be exempt from disclosure, the State has not explained why any such exempt items are necessary to a proper decision in the proceeding. Finally, to the extent that the instant discovery requests seek information about PFS' financial qualifications that has been withheld from public disclosure as proprietary information, the State has been afforded access to that material by the Applicant under a confidentiality agreement, and the State has shown no reason why it could not obtain the requested information from the Applicant.

LES facility for no more than a single production and shipping cycle, whereas SNF will accumulate at PFS for decades.

REQUEST FOR ADMISSION NO. 28. Please refer to Staff's Position Item 2, page 4, ¶2 (references to the LES decision): Do you admit that the PFS proposal differs from the LES proposal in that in the event the LES facility became uneconomic to operate or had to close for other reasons, the tonnage inventory of special nuclear material at LES would be very much smaller than the tonnage of SNF held at PFS when fully operational in the base case.

REQUEST FOR ADMISSION NO. 29. Please refer to Staff's Position Item 2, page 4, ¶2 (references to the LES decision): Do you admit that the PFS proposal differs from the LES proposal in that in the event that a customer defaulted on payment for LES's enrichment service, the cost of enriching the product could be recovered by selling the enriched fuel to another utility in the normal course of business, whereas in the case of PFS, disposing of a defaulting customer's SNF may be close to impossible, especially where the defaulting customer no longer had available an operating reactor.

The Staff objected to these requests for admission on the grounds that they (a) are vague and ambiguous (Requests 24-29), (b) call for speculation as to why PFS framed its proposal in the manner that it did (Requests 24-29), (c) constitute compound questions (Requests 25-29), and (d) seek the discovery of information that is not relevant to this proceeding and is not reasonably calculated to lead to the discovery of admissible evidence (Request 24). Staff Responses at 12-14.³

In its motion to compel answers to these particular requests for admissions, the State asserts that it "simply asks the Staff to admit that the PFS proposal under Part 72 is different from the LES

³ The Staff further objects to Request for Admission No. 24, on the grounds that it calls, in part, for a legal conclusion. The Staff did not raise this objection initially, since it appeared from the (complex) wording of the request that the State was asking a factual question concerning PFS' reasons for framing its proposal in the manner that it did; in light of recent discussions between the Staff and the State concerning the meaning of this request, the Staff adds this objection now. If the language of this request had been more clear, this objection would have been raised sooner.

proposal under Part 70." Motion at 6-7. "Simple" is not a word that may fairly be used to describe these requests -- nor has the State requested the "simple" admission which it now claims to have filed. On the contrary, the State's requests utilized convoluted and extraordinarily complex phraseology to which no person could fairly be expected to "admit," particularly since any such admission could be used as evidence in the proceeding. *See* 10 C.F.R. § 2.742(c). In addition, inasmuch as these requests, as worded, ask the Staff to admit that the PFS proposal differs from the LES proposal for a variety of stated reasons, the requests appear to call for speculation by the Staff as to why PFS framed its proposal in the manner that it did.

Finally, these LES-related requests for admission go beyond the scope of permissible discovery, in that they seek to have the Staff compare the nature and safety of the LES and PFS facilities. Such information is simply irrelevant to this proceeding and is not reasonably calculated to lead to the discovery of admissible evidence. The Staff's statement of position concerning Contention Utah E, filed on December 15, 1999, indicated that the Staff developed its proposed license conditions based, in part, on its reading of "the financial conditions imposed by the Commission" in the LES proceeding.⁴ Regardless of the relative safety, risks, or storage conditions that pertain to the LES and PFS facilities, each applicant is required to demonstrate sufficient financial assurance to cover the anticipated costs for that facility, whatever those costs may be and whatever may be the reason for those costs to be expected. Responses to the State's six requests for admissions concerning the relative costs of these two facilities would not affect the outcome of a determination as to whether PFS had provided sufficient financial assurance to cover its anticipated

⁴ *See* "NRC Staff's Statement of Its Position Concerning Group I-II Contentions," dated December 15, 1999, at 4.

costs. No response to these requests should be required, since the requested information is not "necessary to a proper decision in the proceeding. See 10 C.F.R. §§ 2.720(h)(2)(ii).⁵

C. Requests for Admission 44 and 46 (Debt Financing).

In its Requests for Admission Nos. 44 and 46, the State asked as follows:

REQUEST FOR ADMISSION NO. 44. Please refer to Staff's Position page 5-6, Item 8: PFS has stated that it will consider debt financing only if there is insufficient demand from members and others to fund construction and operation based on equity contributions and Service Agreements. Do you admit that without a documented market or loan guarantees there is no reasonable assurance that debt financing will be available to PFS.

REQUEST FOR ADMISSION NO. 46. Please refer to Staff's Position page 6, Item 8, ¶1: "such as: (1) commercial bank loans secured by mortgages, assignment of Service Agreements, and other contracts and security interests in other project-related assets. . ." Do you admit that if the revenue from executed Service Agreements is insufficient to fund the cost of construction and operation of the facility, then those same Service Agreements will be insufficient as collateral for a loan to cover the balance of construction financing, *i.e.*, if the income stream from the Service Agreements is used to fund the non-debt part of construction, then it is not available as collateral for a loan.

In response, the Staff objected to these requests on the grounds that they (a) are vague and ambiguous (Requests 44 and 46), (b) constitute a compound question (Requests 44 and 46), and (c) improperly characterize the Staff's statement of position and/or PFS' statements (Request 44).

⁵ In addition, inasmuch as the State is able to conduct its own analysis of the two facilities, based on information that is "reasonably obtainable" by the State in the LES and PFS dockets, the Staff should not be required to respond to these requests. See 10 C.F.R. § 2.720(h)(2)(ii). In this regard, the Staff notes that it is an adequate response to a discovery request for any party to state that the information or document requested is available in the public domain and to provide information to locate the material requested. 10 C.F.R. § 2.740(b)(1); *accord*, *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1)*, CLI-79-8, 10 NRC 141, 147-148 (1979).

The State disputes the Staff's view of these requests, and argues that Request 46 is "straightforward." Motion at 7-8.

Contrary to the State's assertions, the language of these requests for admission preclude an admission or denial by the Staff. First, Request 44 contains an incorrect predicate for its compound question, by incorrectly claiming that "PFS has stated that it will consider debt financing only if there is insufficient demand from members and others to fund construction and operation based on equity contributions and Service Agreements." This characterization differs from PFS' actual statement, which is more correctly described in the Staff's Statement of Position, at 6 (cited in Request 44). Second, Request 44 includes the phrase "documented market" -- a term which was left undefined by the State and is not recognized or understood by the Staff. Finally, Request 46 improperly consists of a stream of clauses, predicates and non-sequiturs, which the Staff simply is unable to understand or properly admit -- particularly since any admission could be introduced into evidence. As framed, these requests are simply impossible to admit or deny.

D. Request for Admission 36 (Inter-Customer Liability).

In its Request for Admission No. 36, the State inquired as follows:

REQUEST FOR ADMISSION NO. 36. Please refer to Staff's Position page 5, Item 5: "PFS has stated that Customers will retain title to their own fuel during storage . . . PFS plans to state in the Service Agreement the terms . . . PFS must address such considerations in the PFS Service Agreements . . ." Do you admit that PFS has not documented the relationships among customers, including but not limited to, (a) the responsibility of paying customers in the event another customer defaults on its payments, or (b) in the event of the need to apportion financial responsibility for a serious accident, or (c) in the event there is a need for funds to tide PFS over because required annual payments are insufficient to cover the costs of off-normal events.

The Staff objected to this request on the grounds that it (a) is vague and ambiguous, and (b) calls for speculation. Response at 16.

In its motion to compel, the State belatedly attempts to explain the meaning of this request. Motion at 8. This attempt to explain what the State meant to request does not overcome the Staff's objection that this complex, multi-part request for admission, as framed, is overly vague and ambiguous, and therefore can not be admitted or denied. Further, nowhere does the State respond to the Staff's objection that this request would require the Staff to engage in speculation. As worded, this request improperly requires the Staff to speculate that "PFS has not documented the relationships among customers . . . because required annual payments are insufficient to cover the costs of off-normal events." Thus, as worded, this request calls for speculation rather than the discovery of admissible evidence, and no further response to this request should be required.

CONCLUSION

The Staff has properly objected to responding to the ten improper requests for admission contained in the State's Fourth Requests, as set forth above. Accordingly, pursuant to 10 C.F.R. §§ 2.730(c) and 2.740(c), the Staff respectfully requests that the Licensing Board (a) issue a Protective Order to protect the Staff from having to respond to these requests for admission, and (b) deny the State's pending motion to compel further responses to these requests.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 11th day of February 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of)
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PRIVATE FUEL STORAGE LLC)
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(Independent Spent)
Fuel Storage Installation))

Docket No. 72-22-ISFSI

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATION STAFF

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 FOURTH SET OF DISCOVERY REQUESTS (CONTENTION E)'" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the Nuclear Regulatory Commission's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the United States mail, first class, as indicated by double asterisk, with copies by electronic mail as indicated, this 11th day of February, 2000.

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