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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECURITY
RULEMAKING AND
ADJUDICATION 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))	February 7, 2000

**STATE OF UTAH'S MOTION TO COMPEL APPLICANT TO RESPOND TO
STATE'S NINTH 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 requests for admissions and documents propounded in State of Utah's Ninth Set of Discovery Requests Directed to the Applicant (January 19, 2000) ("State's Discovery Requests"). This Motion to Compel relates to Utah Contention E (Financial Assurance) and is supported by the Declaration of Dr. Michael Sheehan,¹ attached hereto as Exhibit 1.

FACTUAL BACKGROUND

The State submitted its "Ninth Set of Discovery Requests Directed to the Applicant (Utah Contentions E and S)" on January 19, 2000. PFS responded with "Applicant's Objections and Responses to State of Utah's Ninth Set of Discovery

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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Requests" ("Applicant's Response to 9th Set") dated January 31, 2000.² The State sent PFS two letters on February 4, 2000, setting forth the basis of the State's concerns regarding the deficiency of PFS's responses. *See* State's February 4, 2000 letters, attached hereto as Exhibit 2. The State and PFS have only been able to resolve one of the discovery disagreements listed in the State's February 4 letter (Admission Request No. 4). The issues left unresolved relate to PFS's ability to demonstrate financial qualifications notwithstanding its reliance on two funding commitments.

As it has in the past, generally 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. In addition, PFS objected to the State's document requests as being late. Notwithstanding this objection, PFS did answer some of the State's document requests.

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

² The Applicant filed two responses, a non-proprietary version and a proprietary version. While the State may cite to proprietary pleadings in this Motion, nothing herein contains information claimed by PFS as proprietary.

December 27, 1999 ("State Response"). The Response outlines the State's position that PFS may not simply rely on license conditions to comply with financial qualification regulatory requirements. Additionally, the State served its "Eighth Set of Discovery Requests Directed to the Applicant (Utah Contentions E and S)" on December 29, 1999. The Applicant answered with "Applicant's Objections and Responses to State of Utah's Eighth Set of Discovery Requests" dated January 11, 2000. Due to ongoing disagreements with respect to the Applicant's responses, on January 18, 2000, the State filed the "State's Motion to Compel Applicant to Respond to State's Eight Set of Discovery Requests."

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.

ARGUMENT

I. The State's Document Requests Are of the Same Type and Nature That the Applicant Has Refused to Answer in the Past Thereby Hampering the State's Ability to Develop Its Case.

The State's 9th Set of Discovery to the Applicant, dated January 19, included a request for documents. The Applicant objected to all of the State's document requests on the grounds that the requests were late. *See*, Applicant's Response to 9th Set, Non-proprietary, at 3-4. In the past, PFS and the State have responded to each others' discovery requests, including document request, within the later of 10 days or, by

standing agreement, within 8 working days. When timing the filing of the Ninth Set of Discovery Requests, the State relied upon the usual practice of responding to all discovery in 10 days. The State overlooked the rule that parties are allowed fifteen days to respond to document requests.

These document requests are of the same type and nature that the Applicant has refused to answer in the past and are critical to the State's preparation of its case.³ While the State's document request were filed late, the State, nevertheless, respectfully appeals to the Board to include all the document requests in this Motion to Compel. Such a request should not broaden or delay the proceedings, because, depending on the outcome of summary disposition on Contention E, the State anticipates that PFS and the State will re-negotiate all the discovery disputes on Contention E in light of any ruling by the Board.

II. 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

³ The specific Document Requests are discussed in detail in the following section.

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. Member Relationship, Member Obligation, or Member Termination:

Contention E, Request for Admission Nos. 2, 3, 5, 10, 11, 12, 13, 14, 19, and 20 and Document Request Nos. 1, 12, 13, 14, 15, 21, and 28 relate to membership in the PFS L.L.C. with respect to new members or prospects of new members, member interest, member contributions or obligations, individual member financial strength, or terminating members. As previously discussed, the Applicant objected to all documents requests as late. See section I above. In general, for each of the above discovery requests, the Applicant principally claimed the discovery requests were "irrelevant to PFS's demonstration of its financial qualification" because PFS is relying on its two funding commitments to demonstrate its financial qualifications. See e.g., Applicant's Response to 9th Set, Non-proprietary, at 4-5. However, as stated in an earlier motion to compel, since the Board has not yet ruled on the Applicant's Motion for Partial Summary Disposition of Utah Contention E, there is no legal basis for the Applicant's refusal to answer the discovery requests because the requests are within the scope of the admitted bases of Contention E. See December 14, 1999 State Motion to Compel at 6 .

The Applicant has no independent assets of its own and, thus, must rely on member contributions, revenue from Service Agreements, or debt financing to fund

construction, operation, and decommissioning of the proposed ISFSI. See State Response at 12. The number of members and member contributions are critical to assessing PFS's financial qualifications. Contention E, base one reads:

The information in the application about the legal and financial relationship among the owners of the limited liability company (i.e., the license Applicant PFS) is deficient because the owners are not explicitly identified, nor are their relationships discussed. See 10 C.F.R. §§ 50.33(c)(2) and 50.33(f) and Appendix C, § II of 10 C.F.R. Part 50.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP 98-7, App. A, 47 NRC 142, 251 (1998). In addition Contention E, base two reads:

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.

Id. Contention E, Request for Admissions Nos. 2, 3, 5, 10, 11, 12, 13, 14, 19, and 20 and Document Request Nos. 1, 12, 13, 14, 15, 21, and 28 are directly relevant to bases 1 and 2 which assert that the Applicant must identify its current members, member relationship, and member obligations to demonstrate its financial strength.

2. Contention E, Request for Admission No. 7.

Contention E, Request for Admission No. 7 asks for an admission based on PFS's fees charged for storage. Again, the Applicant claimed that this request is irrelevant to PFS demonstrating its financial qualifications because of its reliance on its two funding

commitments. Applicant's Response to 9th Set, Proprietary Version, at 4. As stated earlier, PFS has no independent assets of its own and will rely in part on the revenue generated from Service Agreements to fund construction, operation, and decommissioning. See State Response at 12.

Additionally, base 3 states that "[t]he application fails to provide enough detail concerning the limited liability company agreement between PFS's members, the business plans of PFS, and the other documents relevant to assessing the financial strength of PFS . . ." 47 NRC at 252. Therefore, the revenue generated from service agreements, including the amount of storage fees, are directly relevant to base 3 and assessing the financial strength of the Company.

3. Financial Base, Assets, Liabilities, and Capital Structure:

Document Requests Nos. 2, 3, 4, 5, 9, 16, 19, and 29 relate to assessing PFS's financial base in that it asks for PFS Board meeting minutes⁴, monthly revenue/expense reports, Project Director's reports, income tax returns, internal audits reports, documents showing current assets, liabilities and capital structure, and PFS corporate data required

⁴ Moreover, the Applicant has an obligation to supplement its discovery responses to past discovery requests, including document requests. Since the formal discovery period, the Applicant's unilateral position that the above described documents do not contain relevant information regarding Utah Contention E has unfairly hampered the State's efforts to obtain documents under the Commission's "broad and liberal treatment" discovery standard. Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 461-62 (1974). For example, minutes for PFS board meetings held between March and December 1998 have been approximately 90% redacted. Furthermore, PFS has produced Board minutes for just one month for all of 1999.

by Bureau of Land Management. In its response, in addition to asserting the document request was late (*see* section I above), the Applicant generally claimed the requests were not relevant to Contention E. *See e.g.*, Applicant's Response to 9th Set, Non-Proprietary, at 13. Contrary to the Applicant's position, these document requests are directly related to Contention E, basis 4⁵. Basis 4 asserts that the Applicant's assets, liabilities, and capital structure must be evaluated to determine its financial qualifications. The documents requested all relate to evaluating the Applicant's assets, liabilities, and capital structure.

Thus, the State requests that the Applicant be ordered to respond to the document requests to the extent the requested documents have information that directly contains or will lead to the discovery of the Applicant's assets, liabilities and capital structure.

4. Marketability Related:

Document Requests Nos. 6, 7, 11, 12, 13, 14, 17, 21, 27, 28, 32, and 33 all relate to PFS's ability to market its spent fuel storage services. The Applicant again objects to these request because of the lateness of the request (*see* section I above) and relevance. *See e.g.*, Applicant's Response to 9th Set, at 14-15. As stated earlier, the Applicant has no independent assets of its own and must rely on its ability to raise funds through Service Agreements or equity contributions. State Response at 12. The Applicant's ability to

⁵ Bases 4 states "[t]o demonstrate its financial qualifications, the applicant must submit as part of the license application a current statement of assets, liabilities and capital structure . . ." LBP 98-7, App. A.

market its services is directly related to its ability to raise funds and subsequently demonstrate its financial qualification. *See also*, December 14, 1999 Motion to Compel at 6-8. Moreover, base 7 asserts that “the applicant must document an existing market for the storage of spent nuclear fuel and the commitment of sufficient number of Service Agreements to fully fund construction of the proposed ISFSI.” 47 NRC at 252.

Therefore, documents related to PFS’s ability to market its spent fuel storage services are directly relevant to Contention E and base 7.

5. Contention E, Document Request No. 24.

Document Request No. 24 requests information about PFS's ability to obtain debt financing. In addition to its objection to the lateness of the request (*see* discussion section I above), the Applicant objects that “PFS’s ability to obtain debt financing is irrelevant to PFS’s qualifications” because “PFS’s financial qualifications stem from its commitments.” Applicant’s Response to 9th Set, Proprietary Version, at 13.

The State disagrees that PFS’s financial qualifications stem from its commitments. *See in general*, State’s Response to Partial Motion for Summary Disposition of Utah Contention E. Additionally, the ability to obtain debt financing and the rate at which it is obtained is relevant to the cost of construction and operation of the proposed ISFSI (*i.e.* Contention E, Basis 6). Basis 6 is not part of PFS’s Partial Motion for Summary Disposition and relevant documents should be produced immediately.

6. Contention E, Document Request No. 25:

Contention E, Document Request No. 25 requests specific language in the Service

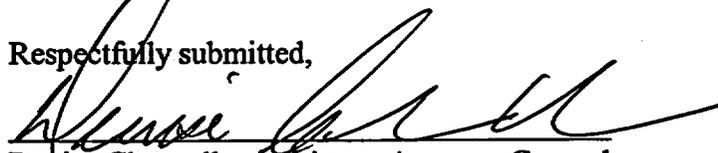
Agreements. First, the Applicant objects that the request is late. See section I above. Next, the Applicant states that it "cannot produce documents responsive to this request, in that PFS has not entered into any service agreements at this time." Applicant's Response to 9th Set, Proprietary Version, at 13-14. The Applicant misreads the request. The State is not asking for copies of executed Service Agreements, but the portions of the Service Agreement language, including draft or non-executed Service Agreements. The State requests the Applicant be ordered to provide the applicable language from any draft or final Service Agreement whether one has been executed or not.

CONCLUSION

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

DATED this 7th day of February, 2000.

Respectfully submitted,



Denise Chancellor, Assistant Attorney General
Fred G Nelson, Assistant Attorney General
Connie Nakahara, Special Assistant Attorney General
Diane Curran, Special Assistant Attorney General
Laura Lockhart, Assistant Attorney General
Attorneys for State of Utah
Utah Attorney General's Office
160 East 300 South, 5th Floor, P.O. Box 140873
Salt Lake City, UT 84114-0873
Telephone: (801) 366-0286, Fax: (801) 366-0292

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S MOTION TO COMPEL FEB 16 AIO :13

APPLICANT TO RESPOND TO STATE'S NINTH SET OF DISCOVERY REQUESTS

was served on the persons listed below by electronic mail (unless otherwise noted) with RULEMAKING & ADJUDICATION STAFF

conforming copies by United States mail first class, this 7th day of February, 2000:

Rulemaking & Adjudication Staff
Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington D.C. 20555
E-mail: hearingdocket@nrc.gov
(original and two copies)

G. Paul Bollwerk, III, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: gpb@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: jrk2@nrc.gov
E-Mail: kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: psl@nrc.gov

Sherwin E. Turk, Esq.
Catherine L. Marco, Esq.
Office of the General Counsel
Mail Stop - 0-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: set@nrc.gov
E-Mail: clm@nrc.gov
E-Mail: pfscase@nrc.gov

Jay E. Silberg, Esq.
Ernest L. Blake, Jr., Esq.
Paul A. Gaukler, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N. W.
Washington, DC 20037-8007
E-Mail: Jay_Silberg@shawpittman.com
E-Mail: ernest_blake@shawpittman.com
E-Mail: paul_gaukler@shawpittman.com

John Paul Kennedy, Sr., Esq.
1385 Yale Avenue
Salt Lake City, Utah 84105
E-Mail: john@kennedys.org

Joro Walker, Esq.
Land and Water Fund of the Rockies
2056 East 3300 South Street, Suite 1
Salt Lake City, Utah 84109
E-Mail: joro61@inconnect.com

Danny Quintana, Esq.
Danny Quintana & Associates, P.C.
68 South Main Street, Suite 600
Salt Lake City, Utah 84101
E-Mail: quintana@xmission.com

Office of the Commission Appellate
Adjudication
Mail Stop: 16-G-15 OWFN
U. S. Nuclear Regulatory Commission
Washington, DC 20555
(United States mail only)

James M. Cutchin
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-Mail: jmc3@nrc.gov
(electronic copy only)

A handwritten signature in black ink, appearing to read "Denise Chancellor", written over a horizontal line.

Denise Chancellor
Assistant Attorney General
State of Utah

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))	February 7, 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 the State's ninth set of discovery requests to the Applicant, and that the statements contained in State of Utah's February 7, 2000 Motion to Compel Applicant to Respond to State's Ninth Set of Discovery Requests, relating to Utah Contention E, are true and correct to the best of my knowledge, information and belief.

Executed this 7th day of February 2000.

By:



Michael F. Sheehan, Ph.D.

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



JAN GRAHAM
ATTORNEY GENERAL

JAMES R. SOPER
Solicitor General

REED RICHARDS
Chief Deputy Attorney General

February 4, 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 Ninth Set of Discovery Requests (Contention E)

Dear Paul:

As we discussed on January 3, 2000, 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 the requests were not relevant to Contention E. 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 Partial 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 it is financially qualified prior to license issuance. The number of L.L.C. members, their relationship, and their financial commitments are relevant to demonstrating PFS's financial base. As previously indicated, marketability is relevant because financing the facility relies upon the ability to market storage services.

In the past, the State and PFS were unsuccessful in resolving PFS's refusal to answer similar discovery requests. Thus, again we recognize that the State and PFS, in all likelihood, will continue to disagree on these matters. 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 probably not be decided until all pleadings have been filed on the State's amended bases to Contention E (i.e. some time after February 11, 2000). 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.

PFS objected to all of the State's document requests on the grounds that the requests were late. When timing the filing of the Ninth Set of Discovery Requests, the State relied upon the usual practice of responding to all discovery in 10 days, or as agreed, in 8 working days. The State overlooked the rule that parties are allowed fifteen days to respond to document requests. While the document request were filed late, the State will, nevertheless, appeal to the Board to include unanswered document requests in its Motion to Compel.

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

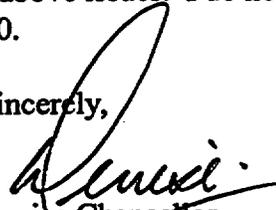
1. **Member Relationship, Member Obligation, or Member Termination: Contention E, Request for Admissions Nos. 2, 3, 5, 10, 11, 12, 13, 14, 19, and 20. Document Request Nos. 1, 13, 14, 15, 25, and 28.** The State believes that the relationship among PFS L.L.C. members, including new members, the number of members, and member obligations are relevant to evaluating PFS's financial base and ability to demonstrate that PFS has reasonable assurance of obtaining the necessary funds.
2. **Contention E, Request for Admission 4.** Although the Request for Admission is based on facts contained in a 1997 set of PFS Board Minutes, it is the only information available to the State because PFS has redacted information it considers "irrelevant" from later Board Minutes produced to the State. The State believes that any financial commitments, including those to Holtec International, are relevant to determining whether PFS will have sufficient funds to construct, operate, and decommission the facility.
3. **Contention E, Request for Admission 7.** The State believes that any proposed changes to the storage fee that PFS may charge is relevant to assessing PFS's financial strength.
4. **Financial Base, Assets, Liabilities: Document Requests Nos. 2, 3, 4, 5, 9, 16, 18, 19, 29, and 30.** These document requests relate to our usual dispute whereby PFS claims that these issues are irrelevant because of the proposed license conditions. The State has a fundamental disagreement with PFS on this point and considers these issues directly on point to whether PFS meets 10 CFR § 72.22(e). *See State's Response to Applicant's Motion for Partial Summary Disposition.*
5. **Marketability Related: Document Requests Nos. 6, 7, 11, 12, 13, 14, 17, 21, 27, 28, 32, and 33.** The issues are the same as those in the two previous motions to compel before the Board.
6. **Contention E, Request for Document 24.** The State believes PFS's ability to obtain debt financing at the rates claimed in the "Financial Plan" are relevant to

demonstrating whether PFS will have sufficient funds to construct and operate the facility.

7. **Contention E, Request for Document No. 25:** The State believes PFS has misread this request as asking for copies of "executed" Service Agreements. However, the State is requesting language from the Service Agreement, which may include any draft or non-executed Service Agreement.

Please contact me if we can resolve any of the above issues. I do not intend to file a Motion to Compel until late Monday, February 7, 2000.

Sincerely,



Denise Chancellor
Assistant Attorney General

cc: Sherwin Turk, Esq., NRC, Office of General Counsel
(email only: set@nrc.gov)

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



JAN GRAHAM
ATTORNEY GENERAL

JAMES R. SOPER
Solicitor General

REED RICHARDS
Chief Deputy Attorney General

February 4, 2000

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

Via E-mail and First Class Mail

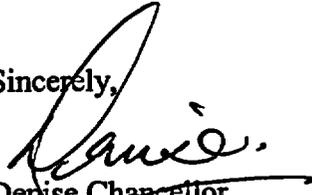
re: State's Proposed Motion to Compel PFS to Respond to
State's Ninth Set of Discovery Requests (Contention E)
Supplemental Letter

Dear Paul:

Earlier today I sent you a letter discussing the State's position with regard to PFS refusing to answer discovery requests in the State's Ninth Set of Discovery. In that letter, I forgot to include Document Request No. 18 in the section entitled "Member Relationship, Member Obligation, or Member Termination."

I hope this has not caused you any inconvenience. Please call me if you would like to discuss Document Request No. 18 or the earlier letter.

Sincerely,


Denise Chancellor
Assistant Attorney General

cc: Sherwin Turk, Esq., NRC, Office of General Counsel
(email only: set@nrc.gov)