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February 16, 2000
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF GENERAL COUNSEL
RULEMAKING AND
ADJUDICATION STAFF

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

Docket No. 72-22-ISFSI

NRC STAFF'S MOTION FOR PROTECTIVE ORDER,
AND RESPONSE TO "STATE OF UTAH'S MOTION
TO COMPEL DEPOSITION OF NRC STAFF WITNESS"

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 produce additional witnesses for deposition by the State of Utah concerning the HI-STAR 100 cask system, as demanded in the "State of Utah's Motion to Compel Deposition of NRC Staff Witness" ("Motion to Compel"), dated February 9, 2000.

In support of this request, the Staff submits that the State's demand to conduct depositions of Staff witness(es) concerning the HI-STAR cask system (a) seeks to discover information that is not relevant to the thermal design of the Private Fuel Storage, L.L.C. ("PFS") facility, and is therefore not relevant to Contention Utah H or reasonably calculated to lead to the discovery of admissible evidence, (b) is not supported by a showing of "exceptional circumstances" and is not necessary to a proper decision in this proceeding, as required by 10 C.F.R. § 2.720(h)(2)(i) and (ii),

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(c) is unduly burdensome and oppressive, in that the Staff has already offered to produce a witness who possesses the requisite knowledge to respond to the State's discovery concerning the HI-STORM 100 cask system that is proposed to be used at the PFS facility, and (d) constitutes an improper and unjustified attempt to extend the time period established by the Board for discovery against the Staff. For these reasons, as 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 produce a witness for deposition on the HI-STAR cask system, and the State's motion to compel the Staff to appear for such deposition should be denied.

DISCUSSION

In its Motion to Compel (and its related notice of deposition),¹ the State asserts that it should be permitted to depose a member of the Staff concerning the Staff's approval of the HI-STAR 100 storage cask system (see, e.g., Motion to Compel at 1, 7; Corrected Notice of Deposition at 1).² In support of this assertion, the State argues that the Staff's approval of the HI-STORM storage cask system (which PFS proposes to utilize at its facility) rested, in part, on the Staff's approval of the HI-STAR storage cask system, thereby making the Staff's approval of the HI-STAR cask system

¹ "State of Utah's Notice of Deposition of NRC Staff Witness Regarding NRC Staff Safety Evaluation of HI-STAR 100 Cask System" ("First Notice of Deposition"), dated February 7, 2000, as corrected by "State of Utah's Corrected Notice of Deposition of NRC Staff Witness Regarding NRC Staff Safety Evaluation of HI-STAR 100 Cask System" ("Corrected Notice of Deposition"), dated February 8, 2000.

² The State has retreated from its earlier insistence that it be permitted to depose the Staff concerning the HI-STAR 100 transportation cask system. See, e.g., Letter from Diane Curran, Esq., to Sherwin E. Turk, Esq., dated February 7, 2000 (Motion to Compel, Exh. 5; First Notice of Deposition, at 1). The Staff had opposed that request on the grounds, *inter alia*, that it exceeded the permissible bounds of this proceeding. See Letter from Sherwin E. Turk, Esq., to Diane Curran, Esq., dated February 4, 2000 (Motion to Compel, Exh. 3).

proper here. The State bases this assertion on a single sentence contained in the Staff's Preliminary Safety Evaluation Report ("Preliminary SER") for the HI-STORM 100 storage cask system,³ which references the Staff's review of the HI-STAR cask system.⁴ According to the State, "[b]y referencing the HI-STORM 100 safety evaluation in the safety evaluation for the PFS thermal analysis, the NRC Staff must in turn rely on the HI-STAR 100 safety evaluation and the computer runs done in support of that analysis" (Motion to Compel, at 4; emphasis added). The State argues that this makes a deposition of the Staff concerning the HI-STAR cask system relevant here:

³ The Preliminary SER for the HI-STORM 100 cask system was issued for comment by the Staff on July 22, 1999, in the generic rulemaking proceeding on Holtec International's application for a Certificate of Compliance ("CoC") for the HI-STORM-100 storage cask system. As is apparent from the document's name (and the letter of transmittal which accompanied it), the Preliminary SER constitutes a draft report which was issued for public comment as part of the rulemaking proceeding. The Staff has received a number of comments in response to the Preliminary SER, including comments by the State of Utah -- some of which concern the very sentence focused upon by the State here (*see* n. 4, *infra*). While a final SER on the HI-STORM CoC has not yet been published, the Staff notes that revisions to the Preliminary SER, in response to the public comments, are under consideration in the rulemaking proceeding at this time.

⁴ The sentence in the Preliminary SER of concern to the State (underlined in the text below), reads as follows:

The staff reviewed all inputs, assumptions, methodology, and results of the applicant's temperature and pressure analyses which were submitted in support of the SAR. All the assumptions were found to be in compliance with NUREG-1536 Section 4.V.5.(c). Input parameters are consistent with design values for the HI-STORM overpack. The applicant selected suitably bounding and appropriate boundary conditions for normal, off-normal, and accident conditions. Previous staff evaluation of the applicant's HI-STAR 100 SAR's FLUENT computer code results, using the ANSYS finite element computer code, confirmed the temperature calculation results of this method. . . .

Preliminary SER, 4.5.4, "Confirmatory Analysis," at 4-9; emphasis added. *See* Motion to Compel at 3.

Here, the requested deposition should be granted because it is reasonably calculated to lead to the discovery of evidence that would be admissible at the hearing on Contention H. Specifically, the State seeks to learn the extent to which the Staff now relies or relied in the past on the HI-STAR safety evaluation for its evaluation of the site-specific thermal analysis for [the] PFS facility.

The State also seeks to use the deposition for the purpose of exploring inconsistencies between representations made by the Staff in the SERs for the HI-STORM and HI-STAR storage casks systems, and representations made by the Staff in response to discovery on Contention H. . . .

Motion to Compel at 7; emphasis added. The State then lists a number of asserted discrepancies in various statements by the Staff -- (a) purported discrepancies between the HI-STORM Preliminary SER and the earlier HI-STAR cask preliminary SER, and (b) purported discrepancies between the HI-STORM Preliminary SER and certain discovery answers filed by the Staff in this proceeding.

Id. at 7-9.

Notwithstanding its facial appeal, the State's Motion to Compel suffers from one fundamental defect -- which demonstrates its total lack of substance: In brief, the Staff has voluntarily offered to produce a witness for deposition (Mr. Jack Guttman) who possesses the requisite knowledge to respond to the State's discovery concerning these matters, and the State has shown no reason to believe that further Staff depositions are necessary. The following specific considerations support this conclusion.

First, the State indicates that it "seeks to learn the extent to which the Staff now relies or relied in the past on the HI-STAR safety evaluation for its evaluation of the site-specific thermal analysis for [the] PFS facility." However, Mr. Guttman was responsible for the Staff's thermal analysis for the PFS facility -- and he is fully capable of responding to questions concerning the

extent (if any) that the Staff relies or has relied upon the HI-STAR safety evaluation in its thermal analysis for the PFS facility.

Second, the State indicates that it "also seeks to use the deposition for the purpose of exploring inconsistencies between representations made by the Staff in the SERs for the HI-STORM and HI-STAR storage casks systems" However, Mr. Guttman was responsible for presenting the statements that are of concern to the State in section 4.5.4 of the Staff's Preliminary SER for the HI-STORM cask system -- and he is fully capable of explaining and/or clarifying the meaning of the Preliminary SER in this regard.

Third, the State indicates that it seeks to explore "inconsistencies between representations made by the Staff in the SERs for the HI-STORM and HI-STAR storage casks systems, and representations made by the Staff in response to discovery on Contention H." However, Mr. Guttman was the person who provided each and every one of the Staff's discovery answers to the State concerning this contention⁵ -- and he is fully capable of explaining precisely what he meant in those answers.

In sum, the Staff has voluntarily and properly offered to produce a knowledgeable witness for deposition by the State concerning these matters -- even agreeing to extend the discovery cut-off

⁵ See, e.g., (1) "NRC Staff's Initial Objections and Responses to 'the State of Utah's First Set of Discovery Requests Directed to the NRC Staff'" ("First Response"), dated June 24, 1999; (2) "NRC Staff's First Supplemental Response to 'the State of Utah's First Set of Discovery Requests Directed to the NRC Staff'" ("First Supplemental Response"), dated July 13, 1999; (3) "NRC Staff's Objections and Responses to the 'State of Utah's Third Set of Discovery Requests Directed to the NRC Staff'" ("Utah Contention H)" ("Third Response"), dated January 10, 2000; and (4) "NRC Staff's Objections and Responses to the 'State of Utah's Fifth Set of Discovery Requests Directed to the NRC Staff (Utah Contentions E, H and L)" ("Fifth Response"), dated February 14, 2000.

period in order to accommodate the State's request to conduct that deposition three weeks after the close of discovery.⁶ The State has shown no reason why it should be permitted to conduct additional depositions of any person other than Mr. Guttman concerning these matters.

Moreover, it is beyond dispute that PFS has not proposed to utilize the HI-STAR storage cask system at its facility. Only the HI-STORM cask system has been proposed for use here.⁷ The Staff has properly identified a knowledgeable person to respond to the State's questions concerning the Staff's thermal evaluation of the HI-STORM cask system and the PFS facility. The State has not shown that "exceptional circumstances" exist to require other persons to appear for deposition, such as where a particular named individual has "direct knowledge of a material fact not known to the witnesses made available" by the Staff, as required under 10 C.F.R. § 2.720(h)(2)(i). Similarly, the State has not shown that the deposition of any Staff witness other than the individual named by the Staff "is necessary to a proper decision in this proceeding," as required by 10 C.F.R. § 2.720(h)(2)(ii). Accordingly, the State has failed to comply with the Commission's requirements for compelling discovery from the Staff.

⁶ The Staff has not agreed to extend the discovery period for any purpose other than the deposition of Mr. Guttman (*see* Letter from Sherwin E. Turk, Esq., to Diane Curran, Esq., dated February 4, 2000, at 2 (Motion to Compel, Exh. 3)), and the Staff would oppose any belated request by the State to extend the discovery period for that purpose -- although no such request has been filed by the State as yet.

⁷ To the extent that any component of the HI-STAR cask system would be used as part of the HI-STORM system at the PFS site, the State is not precluded from raising those matters in its discovery concerning the Staff's proposed approval of the HI-STORM system for use at the PFS site.

Further, in accordance with long-standing Orders issued by the Licensing Board, discovery against the Staff concerning these matters has now closed.⁸ The State has already filed three sets of discovery requests against the Staff concerning Contention Utah H ("Thermal Design"), each of which has been duly answered by the Staff. *See* n.5, *supra*. The Staff has agreed, also, to produce Mr. Guttman for deposition. The State's request that it now be permitted to depose persons other than Mr. Guttman would require an extension of the discovery cutoff period against the Staff, without any showing of good cause.

Finally, the grant of such an extension and requiring the Staff to produce other persons for deposition would be unduly burdensome and oppressive, in that the Staff has already offered to produce a witness who possesses the requisite knowledge to respond to the State's discovery. To compel additional Staff members to appear for deposition at this time would be unfair to the Staff, and would interfere with the Staff's performance of its other review responsibilities as well as its preparation for hearing in this proceeding.

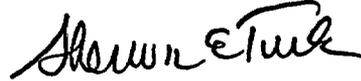
CONCLUSION

The Staff has properly identified a knowledgeable witness for deposition by the State concerning Contention Utah H, including the particular matters raised in the State's Motion to Compel. The State has failed to show good cause to require additional persons to appear for deposition. Accordingly, pursuant to 10 C.F.R. §§ 2.730(c) and 2.740(c), the Staff respectfully

⁸ *See, e.g.*, "Order (General Schedule Revision and Other Matters)," dated February 2, 2000, Attachment A (discovery against the Staff on Contention Utah H to close February 15, 2000).

requests that the Licensing Board (a) issue a Protective Order to protect the Staff from having to produce additional persons, and (b) deny the State's pending motion to compel such appearance.

Respectfully submitted,

A handwritten signature in cursive script that reads "Sherwin E. Turk".

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 16th day of February 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD FEB 17 P3:10

In the Matter of)

PRIVATE FUEL STORAGE LLC)

(Independent Spent)
Fuel Storage Installation))

OFFICE OF SECRETARY
RULEMAKING AND ADJUDICATIONS
Docket No. 72-22-1SFSI NRC STAFF

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S MOTION FOR PROTECTIVE ORDER, AND RESPONSE TO "STATE OF UTAH'S MOTION TO COMPEL DEPOSITION OF NRC STAFF WITNESS" 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 16th day of February, 2000.

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