

21323

DOCKETED
US100

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'00 FEB 28 P4:49

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 23, 2000

**STATE OF UTAH'S RESPONSE TO
NRC STAFF'S MOTION FOR PROTECTIVE ORDER
REGARDING UTAH CONTENTION H**

INTRODUCTION

The State of Utah hereby responds to the NRC Staff's Motion for Protective Order, and Response to "State of Utah's Motion to Compel Deposition of NRC Staff Witness" (February 16, 2000) ("Motion for Protective Order"). The Staff seeks a protective order in response to State of Utah's Motion to Compel Deposition of NRC Staff Witness (February 9, 2000) ("Motion to Compel"). The motion should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

In its discovery on Contention H, the State seeks to depose a member of the NRC Staff who is knowledgeable about the technical content of and basis for the Staff's review of the thermal analysis performed by Holtec, International, for the HI-STAR 100 storage cask system. See State of Utah's Corrected Notice of Deposition of NRC Staff Witness Regarding NRC Staff Safety Evaluation of HI-STAR 100 Cask System (February 8, 2000). The State seeks to depose such a witness for the purpose of learning the extent to

DS03

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, and exploring inconsistencies between representations made by the Staff in the Safety Evaluation Reports (“SERs”) for the HI-STORM and HI-STAR storage cask systems, and representations made by the Staff in response to discovery on Contention H. Motion to Compel at 7.

In correspondence with the Staff, the State informally requested the Staff to produce a witness knowledgeable about the Staff’s evaluation of the HI-STAR 100 thermal design, but the Staff refused to produce such a witness. *See* Motion to Compel at 5. The Staff is also opposing the State’s formal attempts to schedule such a deposition.

ARGUMENT

The Staff makes several arguments in support of its request for a protective order, none of which has merit. First, the Staff contests the relevance of the requested deposition. Although the Staff concedes that the State’s argument in its Motion to Compel has “facial appeal,” the Staff argues that the State’s position is fundamentally defective, because “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.” Motion for Protective Order at 4. According to the Staff, because Mr. Guttman was responsible for the Staff’s thermal analysis for the PFS facility, 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.” *Id.* at 4-5.¹

This argument ignores the demonstrated relevance of the Staff’s evaluation of the HI-STAR 100 thermal analysis to this proceeding. As discussed in the State’s Motion to Compel, the Staff’s statement of position on the thermal design for the PFS facility, taken together with the SERs for the HI-STAR and HI-STORM cask systems show a chain of reliance that goes back to the HI-STAR 100 thermal evaluation. The Staff appears to have done only one independent computer analysis that is relevant to the HI-STORM storage cask system that PFS intends to use at its facility, and that is the computer analysis that was done for the HI-STAR 100 cask system. *See* SERs for HI-STAR and HI-STORM cask systems, quoted at pages 3-4 of the State’s Motion to Compel. It also appears that at least at some time in the past, the Staff intended that its computer analysis for the thermal design of the HI-STAR 100 cask system would also be used to support the adequacy of the thermal design of the HI-STORM 100 cask system.

It is therefore highly relevant for the State to question the Staff member who was responsible for the HI-STAR 100 computer analysis regarding whether, how, and why the

¹ The Staff also claims that the requested discovery 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 concerning the HI-STORM 100 cask system that is proposed to be used at the PFS facility.” Motion for Protective Order at 1-2. This argument essentially amounts to a claim that the State should be satisfied with half a loaf. As discussed above, however, the Staff’s review of the HI-STAR 100 thermal analysis is a relevant subject of inquiry in discovery on Contention H. The Staff has provided no evidence whatever to suggest that producing a witness knowledgeable about this relevant subject matter would be burdensome or oppressive.

Staff may have intended to rely on that computer analysis with respect to the HI-STORM 100 cask system. The fact that the Staff subsequently may have changed its position regarding its reliance on the thermal analysis for the HI-STAR cask system does not alter the relevance of the inquiry. The Staff cannot arbitrarily limit the scope of discovery by unilaterally declaring that it no longer has an interest in this subject matter.

The Staff also argues that because Mr. Guttman is responsible for the statements in the HI-STORM 100 Preliminary SER, he is fully capable of explaining and/or clarifying the meaning of the Preliminary SER in this regard. Motion for Protective Order at 5. The State does not seek solely to question the Staff about the meaning of the HI-STORM 100 SER, however, but also to explore the discrepancies between the Staff's discovery responses and the statements made in the HI-STAR 100 SER. For instance, while both the HI-STORM and the HI-STAR 100 SERs refer to ANSYS computer analyses that the Staff allegedly performed in relation to the thermal analysis for the HI-STAR 100 cask system (*see* Motion to Compel at 3-4), the Staff has stated in discovery that “[n]either the NRC staff nor its contractors has run a computer code other than FLUENT for the purpose of evaluating the thermal design of the Holtec HI-STAR 100 transportation cask system.” 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)” at 11, response to Request for Admission No. 16 (January 10, 2000). This apparent discrepancy raises significant questions as to whether the representations in the SERs are correct, what kind of analysis was actually done, and the degree to which any Staff

analysis performed for the HI-STAR cask system sheds light on the adequacy of the thermal analysis for the PFS facility. In order to inquire into these issues, it is necessary to question someone who is familiar with whatever analysis the Staff did in relation to the HI-STAR 100 SER. The Staff has explicitly refused to produce such a person for deposition. *See* Letter from Sherwin E. Turk to Diane Curran, item no. 3 (February 4, 2000), attached as Exhibit 3 to Motion to Compel.

Second, the Staff argues that the State's demand for a deposition does not meet the standards of 10 C.F.R. § 2.720(h)(2)(i) and (ii),(c), because it is not supported by a showing of "exceptional circumstances" and is not necessary to a proper decision in this proceeding. This argument completely ignores the relevant regulations and case law cited by the State at pages 6 - 7 of its Motion to Compel. The "exceptional circumstances" standard applies where a party seeks to depose a specific Staff member. Here, in contrast, the State seeks to depose an individual of the Staff's choosing, regarding certain subject matter, namely the HI-STAR 100 thermal analysis. The applicable standard is simply the relevance of the subject matter. The Staff has utterly failed to show that the Staff's evaluation of the HI-STAR 100 thermal analysis is irrelevant to this proceeding.²

² The Staff also claims that the "exceptional circumstances" standard should apply because PFS has not proposed to use the HI-STAR 100 storage cask system at its facility. Motion for Protective Order at 6. This argument is frivolous. The question before the Licensing Board is whether the subject matter of the State's notice of deposition, *i.e.*, the Staff's evaluation of the thermal analysis of the HI-STAR 100 cask system, is relevant to this proceeding. The State has clearly demonstrated that in approving the PFS thermal design, the NRC Staff relied indirectly (at least at some time in the past) on its review of the HI-STAR 100 thermal analysis. This is fully sufficient to

Finally, the Staff argues that the State's demand for a deposition constitutes an improper and unjustified attempt to extend the time period established by the Board for discovery against the Staff. This attack on the motives of the State is unwarranted and unsupported. The State gave the Staff ample notice of its wish to depose a member of the NRC Staff regarding the Staff's review of the HI-STAR 100 cask system on February 3, 2000, more than ten days before the close of discovery against the Staff on February 15. E-mail message from Diane Curran to Sherwin Turk, attached as Exhibit 2 to Motion to Compel. The State indicated that it wished to take its depositions on Contention H on March 10, just after the State and PFS finish depositions on Contention H. The Staff did not object to the March 10 date with respect to Mr. Guttman's testimony on the HI-STORM cask system. In noticing the deposition of an NRC Staff member regarding the Staff's evaluation of the HI-STAR cask system, the State also specifically stated that although it wished to conduct the deposition of a HI-STAR witness on March 10, it was willing to negotiate a reasonable alternative schedule with the NRC Staff. Thus, the State was willing to conduct its deposition within the time frame set by the Board if necessary. If any party has unreasonably delayed the completion of discovery on Contention H, the Staff has done so by opposing this patently relevant discovery request.

CONCLUSION

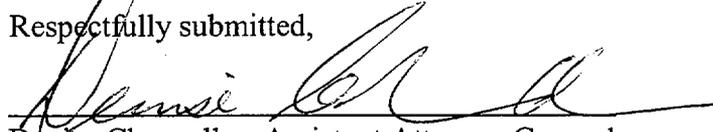
For the foregoing reasons, the Staff's Motion for Protective Order should be

demonstrate the relevance of the subject matter and its discoverability in a deposition.

denied, and the State's Motion to Compel should be granted.

DATED this 23rd day of February, 2000.

Respectfully submitted,

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

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

DOCKETED
USNRC

I hereby certify that a copy of STATE OF UTAH'S RESPONSE TO P 4 :49

NRC STAFF'S MOTION FOR PROTECTIVE ORDER REGARDING UTAH

CONTENTION H was served on the persons listed below by electronic mail (unless

otherwise noted) with conforming copies by United States mail first class, this 23rd 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: pfscae@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

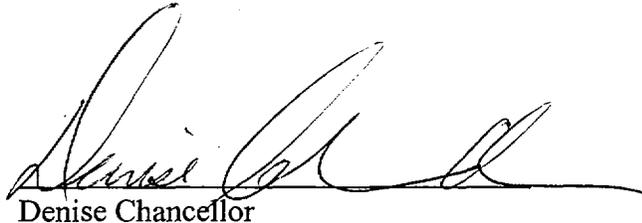
John Paul Kennedy, Sr., Esq.
1385 Yale Avenue
Salt Lake City, Utah 84105
E-Mail: john@kennedys.org

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

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*)

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*)

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

Denise Chancellor
Assistant Attorney General
State of Utah