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February 29, 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)
)
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
NRC STAFF TO RESPOND TO STATE'S FIFTH AND SIXTH
SET[S] OF DISCOVERY REQUESTS (CONTENTION L)"

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 (a) the "State of Utah's Fifth Set of Discovery Requests Directed to the NRC Staff (Utah Contentions E, H and L)" ("Fifth Request"), dated January 31, 2000, as that request pertains to Utah Contention L ("Geotechnical"), and (b) the "State of Utah's Sixth Set of Discovery Requests Directed to the NRC Staff (Utah Contention L)" ("Sixth Request"), dated February 4, 2000"); further, the Staff requests that the Licensing Board deny the State of Utah's ("State") pending motion to compel further responses by the Staff to those requests.¹

¹ See "State of Utah's Motion to Compel NRC Staff to Respond to State of Utah's Fifth and Sixth Set[s] of Discovery Requests (Contention L)" ("Motion to Compel"), dated February 22, 2000. On February 22, 2000, the State filed two other motions to compel discovery responses by the Staff, concerning Contentions Utah E and Utah H; those motions are addressed by the Staff in separate responses filed simultaneously herewith.

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In support of this request, the Staff submits that it has properly responded in part and objected in part to the State's fifth and sixth sets of discovery requests as they pertain to Contention Utah L, as set forth in (1) the "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, and (2) the "NRC Staff's Objections and Responses to the 'State of Utah's Sixth Set of Discovery Requests Directed to the NRC Staff (Utah Contention L)'" ("Sixth Response"), dated February 14, 2000. Accordingly, for the reasons more fully set forth below, the Staff respectfully submits that it is entitled to a protective order, and the State's motion to compel responses to its Fifth and Sixth Requests concerning Contention Utah L should be denied.

DISCUSSION

Contention Utah L ("Geotechnical") asserts that Private Fuel Storage, L.L.C. ("PFS" or "Applicant") "has not demonstrated the suitability of the proposed [Independent Spent Fuel Storage Installation] ISFSI site because the License Application and SAR do not adequately address site and subsurface investigations necessary to determine geologic conditions, potential seismicity, ground motion, soil stability and foundation loading." *See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142, 191, 253 (1998).

The State filed two sets of discovery requests directed to the Staff concerning this contention, both of which are the subject of the instant motion to compel. In the State's Fifth Request, the State filed four document requests concerning Utah Contention L. The Staff agreed to produce documents responsive to three of the State's four documents requests, but objected to the State's fourth document request -- which is the subject of the State's motion to compel. Similarly, in the State's Sixth Request, the State filed 16 requests for admission and four interrogatories concerning this

contention. The Staff objected in part, and responded in part, to those requests, as set forth in the Staff's Sixth Response -- and the State now moves to compel further responses to those requests. For the reasons set forth below, the Staff submits that it properly objected to the State's requests, and no further responses to those requests should be required at this time.²

A. The State's Fifth Request.

In response to the State's Fifth Request, the Staff agreed to produce documents that are responsive to three of the State's four document requests, to the extent that those documents are not privileged or protected from disclosure under 10 C.F.R. § 2.790. Those document requests sought: (a) a consultant's report, referred to in the Staff's Safety Evaluation Report ("SER") for site-related issues, concerning seismic ground motion at the PFS site (Document Request No. 1);³ (b) a

² 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).

³ See Letter from Mark S. Delligatti (NRC) to John D. Parkyn (PFS), dated December 15, 1999 (reissued in its entirety on January 4, 2000) (Safety Evaluation Report for Systems Not Directly Associated with Storage Casks (TAC No. L22462)), § 2.1.6 ("Geology and Seismology").

consultant's report, referred to in the Staff's SER, concerning seismic ground motion at the Three Mile Island Unit 2 ISFSI site in Idaho (Document Request No. 2); and (c) the TMI applicant's seismic exemption request and certain ground motion analyses performed in connection with the TMI exemption request.⁴ The Staff objected to Document Request No. 4, which was as follows:

DOCUMENT REQUEST NO. 4 - UTAH L. To the extent the Staff is relying on the specific cask stability analyses to support its justification of the Applicant's seismic exemption request conditioned on using a 2,000 year return period interval, please produce copies of those analyses for cask tipover. These document(s) may be directly relevant to the Staff's justification for granting the Applicant's seismic exemption request conditional on using a 2,000 year return period interval. According to the State's knowledge, these documents are not exempt from disclosure under 10 C.F.R. § 2.790.

In response, the Staff objected to this request on the grounds, inter alia, that (a) it is vague and ambiguous, since it does not identify "the specific cask stability analyses" that are referred to in the request, (b) it constitutes an impermissible compound question, (c) it mischaracterizes the Staff's position concerning the Applicant's seismic exemption request, as set forth in the Staff's SER for the PFS facility, and (d) the State has not demonstrated that the requested information could not be obtained from another source, *citing* 10 C.F.R. § 2.740(b)(1) (Fifth Response, at 19).

The Staff's objections to this document request should be upheld. First, contrary to the State's insistence that "[i]n essence, the Staff granted the Applicant's request for exemption" (*see, e.g., Motion to Compel, at 3*), the Staff has not granted or determined to grant the Applicant's

⁴ Pursuant to 10 C.F.R. § 2.740(b)(1), a party may respond to discovery by stating that the information is available in the public domain and by providing information to locate the material requested.

seismic exemption request -- nor has the Staff "justified" the granting of that request.⁵ Therefore, any request for documents that may be relied upon by the Staff in granting or "justifying" a grant of the Applicant's exemption request mischaracterizes the Staff's position, and is premature.

Further, the State is incorrect in its claim that the meaning of this request is "apparent" on its face since "[t]he State requested copies of analyses *relied upon by the Staff*" (Motion to Compel at 5; emphasis in original). The Applicant's seismic exemption request is not based upon "cask stability analyses," nor does the Staff's review of that request include consideration of a cask stability analysis. Rather, the adequacy of any cask stability analysis is an issue that would be decided separately from the issue of whether the Applicant's probabilistic seismic hazard analysis ("PSHA") is acceptable and its seismic exemption request should be granted.

For the foregoing reasons, the Staff's objections to this request should be sustained.

B. The State's Sixth Request.

In its Sixth Request, the State filed 16 requests for admission and four interrogatories concerning Contention Utah L. The Staff objected in part, and responded in part, to those requests, as set forth in the Staff's Sixth Response, and the State now moves to compel further responses to seven of its requests for admission and two of its interrogatories. For the reasons set forth below, the Staff submits that no further responses to those requests should be required at this time.

⁵ See also, "NRC Staff's Response to 'State of Utah's Request for Admission of Late-Filed Modification to Basis 2 of Utah Contention L'" dated February 14, 2000 ("Staff Response to Modified Bases - Contention L"), at 5 ("Despite the State's apparent belief to the contrary, the Staff has not granted, or determined to grant, the Applicant's seismic exemption request; nor has the Staff's review of the exemption request been concluded.")

1. The State's Discovery Requests Concerning the Staff's Review of the PFS Seismic Exemption Request and Contention Utah L Are Premature.

The Licensing Board has ruled that any modification of Contention Utah L, to account for the Applicant's filing of its seismic exemption request, "must await favorable Staff action on that request." *See, e.g., Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-21, 49 NRC 431, 439 (1999).* However, as set forth *supra* at 5, the Staff has yet not concluded its review of the Applicant's seismic exemption request and has not determined whether to grant that request. Accordingly, the State's discovery requests concerning the Staff's review of the PFS exemption request impermissibly exceeds the admitted scope of Contention Utah L, and prematurely seeks information concerning the Staff's review of the exemption request.⁶

2. Requests for Admission Nos. 10, 11 and 12.

In its Sixth Request, Requests for Admission 10, 11 and 12, the State requested as follows:

REQUEST FOR ADMISSION NO. 10 - UTAH L. Do you admit that the Rulemaking Plan, SECY-98-128, does not include the use of design earthquakes with ground motions having a return period of 2,000 years for dry cask storage at an ISFSI site?

REQUEST FOR ADMISSION NO. 11 - UTAH L. Do you admit that the standard of using peak ground motion values that have a 90-percent probability of not being exceeded in 50 years for the

⁶ Further, as set forth in the Staff's General Objection No. 7 (Sixth Response at 5), the State's discovery requests are premature under the Licensing Board's schedule for discovery against the Staff, inasmuch as the Staff has not yet stated a position with respect to the Applicant's seismic request or Contention Utah L; that schedule appears to contemplate that such discovery would commence after the Staff states a position on Contention Utah L. *See, e.g., Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), at 4 n.3 and Appendix A (limited discovery window against the Staff on Contention Utah L to commence on September 15, 2000); see also, Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 24 (1998) ("generally, the licensing board should suspend discovery against the staff until the staff issues its review documents regarding the application").*

seismic design of structures, as recommended by the Uniform Building Code and the National Earthquake Hazards Reduction Program (International Conference of Building Officials, 1994; Building Seismic Safety Council, 1995) (collectively "Building Codes") and as cited by the Staff in the SER at 2-45, has been superseded by more stringent standards in later and/or pending versions of those Building Codes?

REQUEST FOR ADMISSION NO. 12 - UTAH L. Do you admit that the building-code standards for seismic safety cited by the Staff in the SER at 2-45 are intended to provide minimum life-safety standards for buildings and structures occupied by humans and are not intended for high-level nuclear waste storage facilities?

The Staff objected to each of these admission requests -- which ask the Staff to restate the contents of documents that are already in the State's possession -- on the grounds that the State has shown no reason why it could not obtain the requested information from other sources, including the referenced documents, which speak for themselves (Sixth Response, at 10-11). In addition, the Staff objected to Requests for Admission 11 and 12 on the grounds that they (a) are vague and ambiguous, (b) constitute an impermissible compound question, (c) mischaracterize the Building Seismic Safety Council document as a "building code." *Id.*

These objections should be sustained. The filing of a "request for admission" to require a party to restate the contents of documents that are in the requesting party's possession serves no useful purpose; as noted by the Staff, the referenced documents speak for themselves.⁷ Further, where, as here, the requesting party frames its questions in an ambiguous manner or includes

⁷ There is no merit in the State's claim that these requests for admission are "asking about the Staff's understanding of the intended use of those documents" (Motion to Compel at 6). These requests do not ask for the Staff's understanding of the referenced documents; further, if the State wanted to inquire as to the Staff's understanding, it could have done so in a clear manner, preferably in the form of interrogatories -- which, as the State knows well, are subject to a number limitation.

incorrect statements in those questions,⁸ the responding party has no choice but to file an objection thereto. Accordingly, the Staff's objections to these requests should be sustained.

3. Requests for Admission Nos. 13, 14, 15, and 16.

In its Requests for Admission 13, 14, 15, and 16, the State requested as follows:

REQUEST FOR ADMISSION NO. 13 - UTAH L. Do you admit that the occurrence of vibratory ground motions exceeding design basis ground motions with an estimated average return period of 2,000 years should be considered a credible event?

REQUEST FOR ADMISSION NO. 14 - UTAH L. Do you admit that the occurrence of vibratory ground motions exceeding design basis ground motions with an estimated average return period of 10,000 years should be considered a credible event?

REQUEST FOR ADMISSION NO. 15 - UTAH L. Do you admit that the occurrence of vibratory ground motions exceeding design basis ground motions developed from 84th percentile deterministic ground motions should be considered a credible event?

REQUEST FOR ADMISSION NO. 16 - UTAH L. Do you admit that tipover of spent fuel storage casks at the proposed PFS ISFSI should be considered a credible event?

⁸ For example, Request for Admission No. 11 is impermissibly compound and includes unacceptable predicates, which render it too complex and garbled to admit, in its claim that "the standard of using peak ground motion values that have a 90-percent probability of not being exceeded in 50 years for the seismic design of structures, as recommended by the Uniform Building Code and the National Earthquake Hazards Reduction Program, 1995) . . . has been superseded by more stringent standards in later and/or pending versions of those Building Codes." Similarly, Request for Admission No. 12 is impermissibly compound and includes unacceptable predicates, in asking for an admission "that the building-code standards for seismic safety cited by the Staff in the SER at 2-45 are intended to provide minimum life-safety standards for buildings and structures occupied by humans and are not intended for high-level nuclear waste storage facilities." Further, these questions incorrectly refer to one document as a "building code," and impermissibly inquire as to two unrelated documents and possible revisions thereto in a single statement. As stated, these requests are simply too complex and confused to admit.

The Staff objected to each of these requests on the grounds that they (a) are vague and ambiguous, and (b) constitute impermissible compound questions. These objections should be sustained. Despite the State's claim that these requests "address extremely technical subjects with which the Staff should be familiar" (Motion to Compel at 7), the difficulty with these requests is not their subject matter, but the language used by the State in its requests.⁹ The State chose to file these requests in the form of requests for admission. In doing so, it was obliged to formulate clear and concise statements which a responding party could admit or deny. Absent such a clear statement, no response to these requests can properly be required.

4. Interrogatories Nos. 3 and 4.

In its sixth Request, the State posed four interrogatories. The Staff responded to two of those requests, but objected to Interrogatories 3 and 4. Those requests inquired as follows:

INTERROGATORY NO. 3 - UTAH L. If Requests for Admissions 13, 14, or 15 is admitted, please describe what the Staff would consider to be acceptable means for determining, in the aftermath of a seismic event, whether or not the design basis ground motions had been exceeded.

INTERROGATORY NO. 4 - UTAH L. If Request for Admission No. 16 is admitted, please describe what the Staff would consider to be acceptable ways to mitigate the hazard of cask tipover.

⁹ For example, Requests for Admission Nos. 13 and 14 lack the necessary predicates and definitions to support their statement that "the occurrence of vibratory ground motions exceeding design basis ground motions with an estimated average return period of 2,000 [or 10,000] years should be considered a credible event"; moreover, these statements are impossible to understand, in that any event that exceeds a design basis is, by definition, not credible. These same considerations apply to the State's Requests for Admission No. 15, since that request lacks necessary predicates, and seeks an admission that an event which exceeds some undefined design basis is "a credible event." Finally, Request for Admission No. 16 is too imprecise to be capable of admission, in its statement that a "tipover of spent fuel storage casks at the proposed PFS ISFSI should be considered a credible event"; nowhere does the State provide the necessary predicates (*e.g.*, the postulated ground motion) to render this statement understandable.

In response to these interrogatories, the Staff referred to its response to Requests for Admission 13, 14, 15 and 16, which are cited in these interrogatories,¹⁰ and the Staff objected to the requests on the grounds that they are vague and ambiguous, and constitute impermissible compound questions. These objections should be sustained. First, since Interrogatories 3 and 4 ask the Staff to respond only if the Staff had admitted the referenced requests for admission, and since the Staff did not admit to those requests for admission, no response to these interrogatories was required. Second, these interrogatories (and, in particular, Interrogatory No. 4) are impermissibly vague, ambiguous, and compound.¹¹ Accordingly, no further response to these interrogatories should be required.

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that the Licensing Board should (a) issue a Protective Order and (b) deny the State's pending motion to compel further responses to these discovery requests.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 29th day of February 2000

¹⁰ The State is thus incorrect in its assertion that the Staff declined to answer these interrogatories "solely on the grounds that the requests are vague and ambiguous and impermissibly compound" (Motion to Compel, at 7).

¹¹ For example, Interrogatory No. 4 fails to define "the hazard of cask tipover" or the scope or consequences of the postulated event; and it is unclear whether it seeks to learn how a cask tipover event may be prevented, or how the results of a tipover event can be mitigated.

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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

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 NRC STAFF TO RESPOND TO STATE'S FIFTH AND SIXTH SET[S] OF DISCOVERY REQUESTS (CONTENTION L)'" 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 29th day of February, 2000.

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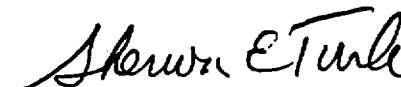
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