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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

OFFICE OF THE
ADMINISTRATIVE JUDGES

SERVED MAR 10 2000

In the Matter of

PRIVATE FUEL STORAGE, L.L.C.

(Independent Spent Fuel
Storage Installation)

Docket No. 72-22-ISFSI
ASLBP No. 97-732-02-ISFSI
March 10, 2000

MEMORANDUM AND ORDER
(Ruling on Discovery Requests)

Relative to contention Utah E/Confederated Tribes F, Financial Assurance, and contention Utah S, Decommissioning, intervenor State of Utah (State) has pending several requests for Board action on discovery matters, including (1) a December 14, 1999 motion to compel responses by applicant Private Fuel Storage, L.L.C., (PFS) to certain of the State's fourth set of discovery requests; (2) a January 18, 2000 motion to compel PFS responses to certain of the State's eighth set of discovery requests; (3) a February 4, 2000 motion to compel NRC staff responses to certain of the State's fourth set of discovery requests; (4) a February 7, 2000 motion to compel PFS responses to certain of the State's ninth set of discovery requests; and (5) a February 22, 2000 motion to compel staff responses to

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certain of the State's fifth set of discovery requests. In all instances, in responses and/or motions for a protective order, PFS and the staff contend, among other things, that the State's motions should be denied as not reasonably calculated to lead to the discovery of relevant information and as potentially moot in light of a pending December 3, 1999 PFS motion for partial summary disposition regarding contention Utah E/Confederated Tribes F.

As is detailed below, we deny in toto the State's motions to compel dated December 14, 1999, February 4, 2000, and February 22, 2000, and grant in part and deny in part the State's January 18, 2000 and February 7, 2000 motions to compel.

A. December 14, 1999 State Motion to Compel PFS Discovery Responses Regarding State Fourth Set of Discovery Requests

DISCUSSION: [State] Motion to Compel [PFS] to Respond to State's Fourth Set of Discovery Requests (Dec. 14, 1999) at 6-9; [PFS] Opposition to [State] Motion to Compel on the State's Fourth Set of Discovery Requests (Dec. 21, 1999) at 5-10.

RULING: At issue relative to this motion are six requests for admissions (Nos. 3 through 8) and six document requests (Nos. 5 through 8, 13, and 14) relating to contention Utah E/Confederated Tribes F that were propounded to PFS on November 19, 1999, and which were the subject of

PFS objections in its response dated December 6, 1999. As described in its motion, the State's admission requests relate to PFS's current and proposed efforts to market service agreements for spent fuel storage services; the continued need of PFS member Northern States Power Company to store fuel at the PFS facility; and the intended use by PFS of the so-called Supko Study that provides a cost-benefit analysis of utility at-reactor spent fuel storage costs relative to the PFS facility. The State declares that, in addition to the Supko Study, the document discovery requests relate to PFS marketing efforts, spent fuel storage market economics, and the interest of non-PFS members in using the PFS facility. These discovery requests are variously described as relevant to contention Utah E/Confederated Tribe F subparts one, two, seven, and eight.

Because the Board today rules in favor of PFS on these portions of the contention in its decision granting in part a PFS December 3, 1999 partial summary disposition motion, see LBP-00-06, 51 NRC __, __ (slip op. at 72-74) (Mar. 10, 2000), these State contested discovery matters are moot, so that the State's December 14, 1999 motion to compel is denied.

B. January 18, 2000 State Motion to Compel PFS Discovery Responses Regarding State Eighth Set of Discovery Requests

DISCUSSION: [State] Motion to Compel [PFS] to Respond to State's Eighth Set of Discovery Requests (Jan. 18, 2000) at 2-9; [PFS] Opposition to [State] Motion to Compel on the State's Eighth Set of Discovery Requests (Jan. 25, 2000) at 3-10 [hereinafter PFS Motion to Compel Response].

RULING: This motion seeks to compel PFS answers to four interrogatories (Nos. 5, 7, 8, and 9) and one request for admissions (No. 5) relating to contention Utah E/Confederated Tribes F and one interrogatory (No. 5) relating to contention Utah S, Decommissioning, that were propounded to PFS on December 29, 1999, and which were the subject of PFS objections in its response dated January 11, 2000. As described in its motion, these State discovery requests relate to PFS's current and potential competitors; the identity of individuals responsible for developing and approving the PFS business plan, for preparing its budget, for preparing a marketing plan or strategy, and for developing and deciding upon a facility construction schedule; an admission as to whether PFS has raised sufficient capital to begin facility construction by September 2000; and the identify of PFS documents dealing with spent fuel storage market economics, the costs of operating proposed or existing independent spent fuel

storage installations (ISFSI) at locations other than PFS, and the methodologies, plans, or procedures for decontaminating and/or decommissioning an ISFSI within the United States. These discovery requests are described as relevant to contention Utah E/Confederated Tribe F subparts two, six, seven, and eight, and contention Utah S.

The Board's ruling today in favor of PFS on paragraphs two, seven, and eight of contention Utah E/Confederated Tribes F in its decision in granting in part a PFS December 3, 1999 partial summary disposition motion, see LBP-00-06, 51 NRC at ___ (slip op. at 72-74), makes contention Utah E-related interrogatory Nos. 5 and 9 and admission request No. 5 moot, so that the State's January 18, 2000 motion to compel is denied with regard to these items. In this regard, the Board notes that, to the degree interrogatory No. 9 requested information relevant to paragraph six of contention Utah E/Confederated Tribes F, the PFS January 11, 2000 response to this interrogatory appears to have provided the relevant information. See [PFS] Objections and Responses to [State] Eighth Set of Discovery Requests [Nonproprietary Version] (Jan. 11, 2000) at 9-10.

Regarding contention Utah E-related interrogatory Nos. 7 and 8 and contention Utah S-related interrogatory No. 5, we have several difficulties with the applicant's

objections to these requests. In seeking to justify its response referring the State to the contention-sorted documents contained in the PFS Salt Lake City, Utah document repository, see id. at 6-9, PFS invokes Federal Rule of Civil Procedure 33(d), which allows a party responding to an interrogatory such as those posed by the State to designate its business records. The mere fact that a party has taken the step, however laudable, of creating a central repository is not sufficient to fulfill its burden under this provision, see APCO Oil Corp. v. Certified Transp., Inc., 46 F.R.D. 428, 431 (W.D. Mo. 1969), especially when it (1) has not made a particularized showing that it would accrue a significant resource burden relative to the interrogatory response; and (2) has only identified a relatively undifferentiated mass of materials as containing the documents that provide the interrogatory answers. See 8A Charles A. Wright, et al., Federal Practice and Procedure § 2178, at 332-33, 336-37 (2d ed. 1994) [hereinafter Federal Practice and Procedure]; see also 7 James W. Moore, Moore's Federal Practice § 33.105[3], at 33-79 to -80 (3d ed. 1999); 54 Fed. Reg. 33,168, 33,174 (1989) (sufficient interrogatory answer is location, title, and page reference to relevant document). Moreover, because we have been provided with no specific information about how many records are involved or the scope of the resource burden that would be imposed on

PFS by requiring it to identify the particular documents, an effort it apparently already has undertaken to some degree by contention-sorting the documents and indexing at least some of them, see PFS Motion to Compel Response at 9 & n.12, we are unable to conclude that the burden of compiling this information is substantially the same for the parties. See 8A Federal Practice and Procedure § 2178, at 334-35. As a consequence, we grant this aspect of the State's January 18, 2000 motion to compel and direct that on or before Monday, March 20, 2000, PFS provide the State with answers to interrogatory Nos. 7 and 8 relating to contention Utah E/Confederated Tribes F and interrogatory No. 5 relating to contention Utah S that list the responsive documents in a format consistent with that used in the PFS January 11, 2000 response.¹

C. February 4, 2000 State Motion to Compel Staff Discovery Responses Regarding State Fourth Set of Discovery Requests

DISCUSSION: [State] Motion to Compel NRC Staff to Respond to State's Fourth Set of Discovery Requests (Contention E) (Feb. 4, 2000) at 2-8; NRC Staff's Motion for Protective Order, and Response to "[State] Motion to Compel NRC Staff to Respond to State's Fourth Set of Discovery Requests (Contention E)" (Feb. 11, 2000) at 3-10; [State]

¹ This deadline can be extended by agreement of the parties.

Response to NRC Staff's Motion for a Protective Order
(Contention E) (Feb. 18, 2000) at 3-6.

RULING: In this motion, the State seeks to compel the staff to answer ten requests for admissions (Nos. 16, 24 through 29, 36, 44, and 46) relating to contention Utah E/Confederated Tribes F that were propounded to the staff on January 13, 2000, and which were the subject of staff objections in its response dated January 28, 2000. As described in its motion, the State's admission requests relate to the staff showing required for financial assurance for other ISFSIs licensed by the NRC; a comparison between the proposed 10 C.F.R. Part 70 Louisiana Energy Services, L.C., enrichment facility and the proposed PFS facility; PFS service agreements and funding; and the relationship among PFS customers for contingencies such as customer defaults and serious accident or off-normal events. These discovery requests are variously described as relevant to contention Utah E/Confederated Tribe F subparts two, seven, eight, nine, and ten as well as the issue of the applicability of the Commission's ruling in Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997), to financial assurance for facilities licensed under 10 C.F.R. Part 72.

Because the Board today rules in favor of PFS on these portions of the contention and the applicability of the

Claiborne case in its decision in granting in part a PFS December 3, 1999 partial summary disposition motion, see LBP-00-06, 51 NRC at ___ (slip op. at 22-31, 72-74), these State contested discovery matters are moot, so that the State's February 4, 2000 motion to compel is denied.²

D. February 7, 2000 State Motion to Compel PFS Discovery Responses Regarding State Ninth Set of Discovery Requests

DISCUSSION: [State] Motion to Compel [PFS] to Respond to State's Ninth Set of Discovery Requests (Feb. 7, 2000) at 3-10; [PFS] Opposition to [State] Motion to Compel on the State's Ninth Set of Discovery Requests (Feb. 11, 2000) at 3-10.

RULING: With this motion, the State seeks to compel PFS to respond to eleven requests for admission (Nos. 2, 3, 5, 7, 10 through 14, 19, and 20) and twenty-four document production requests (Nos. 1 through 7, 9, 11 through 17, 19, 21, 24, 25, 27 through 29, 32, and 33) relating to contention Utah E/Confederated Tribes F that were propounded to PFS on January 19, 2000, and which were the subject of PFS objections in its response dated January 31, 2000. As described in its motion, the State's admission and document requests relate to PFS members' relationships, obligations,

² The onsite liability insurance aspect of subpart ten of contention Utah E/Confederated Tribes F that remains for litigation is not implicated relative to these State discovery requests.

and termination; storage fee charges; materials relating to the PFS financial base, including PFS board meeting minutes, revenue/expense reports, project director reports, income tax returns, internal audit reports, documents showing current assets, liabilities, and capital structure, and PFS corporate data required by the United States Department of the Interior Bureau of Land Management; materials relating to PFS's ability to market its spent fuel storage services; materials concerning its ability to obtain debt financing and the cost of such financing; and customer service agreement language that requires PFS to stay in existence.

These discovery requests are described as relevant to contention Utah E/Confederated Tribe F subparts one, two, three, four, six, seven, and eight.

The Board's ruling today in favor of PFS on paragraphs one, two, three, four, seven, and eight of contention Utah E/Confederated Tribes F in its decision granting in part a PFS December 3, 1999 partial summary disposition motion, see LBP-00-06, 51 NRC at __ (slip op. at 72-74), makes moot the State's January 19, 2000 discovery request relating to requests for admission Nos. 2, 3, 5, 7, 10 through 14, 19, and 20, and document production request Nos. 1 through 7, 9, 11 through 17, 19, 21, 25, 27 through 29, 32, and 33 relating to contention Utah E/Confederated

Tribes F moot, so that the State's February 7, 2000 motion to compel is denied with regard to these items.

Relative to document production request No. 24, contrary to the PFS objections, we find this production request relevant to the cost issue that remains in this proceeding under paragraph six of contention Utah E/Confederated Tribes F. To the degree debt financing is a part of the PFS business plan, the cost of servicing that debt is a cost of construction and operation that is subject to consideration in this proceeding. And this document production request is relevant to the debt servicing cost aspect of that issue.³

There is a procedural hurdle that the State must overcome relative to this document production request, however. In its general objection to this and the other January 19, 2000 document discovery requests, PFS asserted that this request is late under the procedures established by the Board regarding discovery period deadlines, i.e., that a discovery request has to be filed in sufficient time prior to the close of discovery -- here, January 31, 2000 --

³ We contrast this issue with the matter that the State sought to litigate in connection with paragraph eight of contention Utah E/Confederated Tribes F concerning whether debt financing is a viable option for this facility. The issue relative to paragraph six is not whether PFS can obtain debt financing, but rather what costs it will have to absorb in connection with debt financing, i.e., has PFS in its debt service scenario provided reasonable estimates relative to the costs of such financing.

to provide the responding party with a period for a timely response prior to the close of discovery. In this case, because the time to respond to a document production request is fifteen days, see Licensing Board Memorandum and Order (General Schedule for Proceeding and Associated Guidance) (June 29, 1998) at 7 (unpublished), the State's discovery request had to be filed on or before January 14, 2000, the last business day that would permit a timely response by the January 31 discovery closing date. The State acknowledges it missed this date, but asserts its error was inadvertent, based on its mistaken reliance on the parties' practice under which document production responses are provided within ten days. PFS, while objecting on timeliness grounds to all the State's January 19 document production requests, nonetheless has gone on to respond to each, either by answering or objecting, on substantive grounds.

The Board would be well within its authority to dismiss this (and the other State document production requests) as untimely. Indeed, we previously took an analogous action by refusing to extend a discovery deadline to permit a deposition because of a party's failure diligently to pursue discovery within the discovery period. See Licensing Board Memorandum and Order (Ruling on Motions to Extend Discovery and to Quash Deposition Notice) (June 14, 1999) at 5-8 (unpublished). We are confronted with a somewhat different

situation in this particular instance, however. Up to this point, the State generally has been diligent about keeping deadlines or seeking timely extensions, as well as showing an appropriate consideration for other parties' time and resources constraints and a willingness to try to reach reasonable scheduling accommodations to address changing circumstances. Given the apparent importance of this particular discovery request to the still litigable issue of facility costs under paragraph six of contention Utah E/Confederated Tribes F, and the lack of any apparent prejudice to PFS in terms of the time it had to respond to the merits of the document production request, we decline to sustain the PFS timeliness objection. The State, however, should not anticipate that this result will obtain in the face of a similar, future misstep.

We thus grant the State's February 7, 2000 motion to compel relative to document production request No. 24 relating to contention Utah E/Confederated Tribes E, and direct that on or before Monday, March 20, 2000, PFS should produce the documents that are subject to this request.⁴

⁴ As was the case above, this deadline is subject to extension by agreement of the parties.

E. February 22, 2000 State Motion to Compel Staff
Discovery Responses Regarding State Fifth Set of
Discovery Requests

DISCUSSION: [State] Motion to Compel NRC Staff to
Respond to State's Fifth Set of Discovery Requests
(Contention E) (Feb. 22, 2000) at 3-6; NRC Staff's Motion
for Protective Order, and Response to "[State] Motion to
Compel NRC Staff to Respond to State's Fifth Set of
Discovery Requests (Contention E)" (Feb. 29, 2000) at 2-7;
[State] Response to NRC Staff's Motion for Protective Order
(Contention E) (Mar. 7, 2000) at 2-8.

RULING: In this motion, the State seeks to compel the
staff to answer two document production requests (Nos. 9
and 10) relating to contention Utah E/Confederated Tribes F
that were propounded to the staff on January 31, 2000, and
which were the subject of staff objections in its response
dated February 14, 2000. According to the State, the
document requests relate to how the staff drafted and made
final its proposed financial assurance license conditions,
including the conditions that were contained in the staff's
December 15, 1999 Safety Evaluation Report for the
site-related aspects of the PFS application. These
discovery requests are described as relevant to contention
Utah E/Confederated Tribe F subparts two and three.

The Board's ruling today in favor of PFS on paragraphs
two and three of contention Utah E/Confederated Tribes F in

its decision in granting in part a PFS December 3, 1999 partial summary disposition motion, see LBP-00-06, 51 NRC at __ (slip op. at 72-74), these State contested discovery matters relating to contention Utah E/Confederated Tribes F are moot, so that the State's February 22, 2000 motion to compel is denied.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁵



G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

This memorandum and order is issued pursuant to the authority of the Chairman of the Atomic Safety and Licensing Board designated for this proceeding.

Rockville, Maryland

March 10, 2000

⁵ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PFS; (2) intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)

PRIVATE FUEL STORAGE, L.L.C.)

(Independent Spent Fuel Storage)
Installation))

Docket No. 72-22-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON DISCOVERY REQUESTS) have been served upon the following persons by deposit in the U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No. 72-22-ISFSI
LB MEMORANDUM AND ORDER
(RULING ON DISCOVERY REQUESTS)

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Dated at Rockville, Maryland,
this 10th day of March 2000