

May 27, 1999

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
PRIVATE FUEL STORAGE L.L.C.) Docket No. 72-22
)
(Private Fuel Storage Facility))

**INTERVENOR OHNGO GAUDEDAAH DEVIA'S
MOTION TO COMPEL ANSWERS TO INTERROGATORIES
AND TO PRODUCE DOCUMENTS DIRECTED TO THE APPLICANT¹**

Pursuant to 10 C.F.R. § 2.740(f) Intervenor Ohngo Gaudedah Devia (OGD) requests that the Atomic Safety and Licensing Board (ASLB or Board) compel Private Fuel Storage (PFS or Applicant) to fully respond to the interrogatories and document requests stated in OGD's First Set of Discovery Requests Directed to the Applicant. OGD files this motion after receiving responses to its First Set of Formal Discovery Requests from PFS that were unresponsive, evasive, and/or incomplete.

I. APPLICANT'S GENERAL OBJECTIONS

The Applicant raises three general objections that are worthy of response. The Applicant fails to articulate what effect general objections one

¹ In order to eliminate multiple filings, OGD consolidated its Motion to address both interrogatories and document requests. To the extent that a ten-page limit may apply to this Motion, OGD respectfully requests an extension of the page limit.

and two have on OGD's discovery requests. These general objections are discussed below.

The Applicant's general objection one states:

- No 1. The Applicant objects to the OGD's instructions and definitions on the grounds and to the extent that they request or purport to impose upon the Applicant any obligation to respond in manner or scope beyond the requirements set forth in 10 C.F.R. §§ 2.740, 2.741 and 2.742.

Of course, it is obvious that OGD cannot make discovery requests that exceed the scope of the rights provided pursuant to NRC regulation. What the Applicant fails to point out, however, is whether it has refused to respond to any discovery request based upon this objection.

To the extent general objection one forms the basis for any limitation or denial of a response to OGD's discovery requests, the vagueness of the objection requires the Board to order production of the effected information. The Applicant has failed to meet its burden to establish that OGD has exceeded the standards provided by NRC regulation. To the extent the Applicant will now argue that the objection was one of principle not related to any particular discovery request, this post hoc rationalization should be rejected by the Board.

The Applicant's general objection two states:

- No 2. The Applicant objects to OGD's Request for Production of Documents to the extent that it requests discovery of information or documents protected under the attorney-client

privilege, the attorney work product doctrine, and limitations on discovery of trial preparation materials and experts' knowledge or opinions set forth in 10 C.F.R. § 2.740 or other protection provided by law. The Applicant has provided OGD with a Privilege Log that identifies documents subject to these privileges and protections, which the Applicant reserves the right to supplement.

The Applicant's general objection two indicates that information responsive to OGD's discovery request has been withheld based upon some type of privilege. The objection notes the production of a privilege log identifying the withheld documents. However, to date, no privilege log responsive to OGD's formal discovery requests has been produced. Consequently, the Board should order the Applicant to produce any document being withheld based upon privilege because PFS has failed to produce a privilege log describing the document(s) being withheld and the basis for the privilege claimed.² Therefore, PFS has failed to raise an objection in a timely fashion.

II. APPLICANT'S RESPONSES TO INTERROGATORIES

OGD propounded five interrogatories for response under oath by the Applicant. The Applicant answered interrogatories one and two, but objected to interrogatories three through five. The interrogatories that were answered were not answered under oath as required by NRC regulation and general discovery practice. 10 C.F.R. § 2.470b(b). The Board should order the Applicant to re-file its responses to those interrogatories it is required to

² The Applicant's general objection number three was repeated in its objections to specific discovery requests. Therefore, OGD will address this objection in the context of those specific requests.

answer under oath. OGD expects that a corporate official for the Applicant will attest to the accuracy and completeness of all interrogatory responses.

As noted previously, the Applicant refused to respond to interrogatories three through five based upon various objections. The interrogatories at issue, the Applicant's objections, and the arguments supporting OGD's requests are more fully described below.

OGD INTERROGATORY NO. 3. Please provide the names, addresses, telephone numbers, facsimile numbers, and titles of each person, employee, agent, representative (including attorneys), consultant who evaluated potential sites/locations for the proposed PFS facility and who participated in any manner in the decision to choose the Skull Valley Reservation as the site for the proposed PFS facility.

APPLICANT'S RESPONSE: Applicant objects to this Interrogatory as it requests information that is beyond the scope of OGD Contention O as admitted by the Board. See General Objection 3. Specifically, the Contention as admitted by the Board is limited to the asserted "disparate impact" of the PFSF that allegedly results from its location on the Skull Valley Band's Reservation and does not involve the site selection process. See LBP-98-7, supra, 47 NRC at 233. Indeed, the Commission has expressly reminded both the Board and the parties that, in accordance with its LES decision, OGD Contention O is not to involve litigation of the justness or fairness of the site selection process or the motivation of those involved in that process. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 37 (1998).

ANALYSIS CONCERNING INTERROGATORY No. 3

No.

Interrogatory No. 3 merely requests information about the persons involved in evaluating site selection for PFS, including those specifically involved in selection of the site at the Skull Valley Reservation. As narrowly stated this interrogatory is not beyond the scope of discovery. Discovery is

permitted on "any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of any other party ..." 10 C.F.R. § 2.740(b)(1). The rule further states that "[i]t is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Id.

Clearly, producing the names of persons involved in analyses of sites, including the chosen site in Skull Valley, is not beyond the scope of discovery. OGD must be able to identify persons with knowledge of site selection in order to consider whether to depose such individuals or seek follow up discovery. While OGD's environmental justice contention may have been limited, over strong objection, it is not so limited for discovery purposes that OGD is unable to seek the identity of those persons who are relied upon by the Applicant to evaluate siting decisions. OGD expects that such persons have knowledge and information that may assist the group in presenting evidence of disparate impacts.³

Moreover, the Applicant's objection to OGD's interrogatory based upon the reference to other sites that it may have considered is contrary to the guidance provided by the Council on Environmental Quality (CEQ)

³ At a minimum, OGD should be permitted to obtain the identities of persons involved in evaluating Skull Valley as a potential site for the Applicant's proposed facility.

concerning the analysis of environmental justice issues under NEPA. The CEQ has stated:

Under NEPA, the identification of a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe does not preclude a proposed agency action from going forward, nor does it necessarily compel a conclusion that a proposed action is environmentally unsatisfactory. **Rather, the identification of such an effect should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population.**

Council on Environmental Quality, "ENVIRONMENTAL JUSTICE: Guidance Under the National Environmental Policy Act" (December 10, 1997) at 10 (emphasis added). OGD's discovery requests are consistent with the CEQ's guidance and should be honored by the Applicant and the Board. OGD is well within the proper scope of its environmental justice inquiry when it attempts to determine PFS' analysis of alternative sites and strategies for handling nuclear waste. Without full consideration of its discovery needs, OGD, which is already at a great disadvantage in this litigation, will be further limited in its ability to prove the part of one contention it has been authorized to litigate.

ANALYSIS CONCERNING INTERROGATORY No. 4

Yes

Interrogatory No. 4 sought the identities of persons or organizations that have a substantial interest in Private Fuel Storage, LLC. The interrogatory and the Applicant's objection are reproduced below.

INTERROGATORY NO. 4. Please identify each person, organization, and/or entity that has a substantial interest in PFS. For the purposes of this interrogatory the phrase "substantial interest" means an interest equal to or greater than five percent (5%) of the controlling interest or shares of the company. For each person and organization identified please provide: (a) if a person- name, address, telephone number, facsimile number, and title; (b) if an organization- complete legal name, location of corporate headquarters, and the name, address, and telephone number for each of the organization's directors and officers.

APPLICANT'S RESPONSE: Applicant objects to this Interrogatory as it requests information that is beyond the scope of OGD Contention O as admitted by the Board. See General Objection 3.

The Applicant's objection here truly stretches the "scope of OGD's Contention" argument too far. It is important to OGD to fully understand who controls and makes decisions for PFS. This is not as simple as examining an annual report or other publicly available information because OGD's understanding is that PFS is comprised of several other public utilities that have nuclear reactors. As the subject matter of this litigation is about PFS and its application to license a dangerous facility, OGD's request to know who controls PFS is entirely relevant. See, 10 C.F.R. § 2.740(b)(1).

ANALYSIS CONCERNING INTERROGATORY No. 5

yes

Akin to the previous interrogatory, No. 5 seeks information about the facilities that will likely send high level nuclear spent fuel to Skull Valley if PFS' license is approved. Again, the Applicant resorts to the scope of OGD's partly admitted contention argument. Below the interrogatory and the Applicant's response have been provided.

INTERROGATORY NO. 5. For each nuclear power facility that may provide waste to be stored at the proposed PFS facility please identify the name, street address, city, and state of the facility, and fully describe whether the facility currently stores and/or has room to store the type of wastes planned for storage at the proposed PFS facility.

APPLICANT'S RESPONSE: Applicant objects to this Interrogatory as it requests information that is beyond the scope of OGD Contention O as admitted by the Board. See General Objection 3. Moreover, this information relates to the third and fourth bases of OGD Contention O as originally filed -- both rejected by the Board -- which concerned the amount of additional spent fuel storage capacity allegedly needed at U.S. power reactors (basis 4) and the alleged benefits of leaving spent fuel stored on-site at the power reactors as an alternative to the PFSF (basis 3).

OGD should have the opportunity to discover who comprises the Applicants company. This question is partly addressed by identifying the facilities that would benefit should the Applicant's license be granted. Whether these facilities presently have spent fuel storage capacity is relevant because it may allow OGD to seek further information concerning the impacts from storage on those communities. Such information could assist OGD in evaluating the impacts its community may suffer if the PFS facility is licensed and the disproportionate nature of those impacts.

Whether the facilities subject to this interrogatory have storage capacity is also relevant because it may lead to the discovery of information concerning: (1) whether the facility decided to store spent fuel, and, if not why was the idea rejected; (2) if the facility has room but decided not to have on-site storage, were safety and/or human health issues the reason; or (3) were

environmental protection issues a factor in deciding not to use available space for spent fuel storage.

A complete response to this interrogatory is relevant to the subject matter of this litigation -- such as mitigation strategies and attention to alternatives -- issues the CEQ has determined relevant to an environmental justice analysis. Because this inquiry may lead to the discovery of admissible evidence, the Board should grant OGD's motion.

III. APPLICANT'S RESPONSES TO DOCUMENT REQUESTS

OGD submitted ten document requests. The Applicant chose to answer three document requests (No.s 1, 2, and 6). OGD challenges the failure to provide documents in response to Request No.s 3, 4, 5, 7, 8, 9, and 10.

ANALYSIS CONCERNING DOCUMENT REQUEST No. 3

No
This request sought documents pertaining to or supporting testimony or evidence that may be used in opposition to OGD's contention. The request and response state:

REQUEST NO. 3. All documents (including experts' opinions, notes, workpapers, affidavits, and other materials used to render such opinion) supporting or otherwise relating to testimony or evidence that you intend to use at the hearings in opposition to OGD's admitted contention.

APPLICANT'S RESPONSE: Applicant objects to this Request as being overly broad, vague, unduly burdensome and seeking privileged material. Applicant will provide documents with respect to its witnesses as agreed to with respect to other parties. See Applicant's

Objections and Non-Proprietary Responses to State's First Requests
for Discovery, Response to General Interrogatory No. 5 (Apr. 21, 1999).

The Applicant's assertion that this request is "vague" is simply not supported by the plain language of the request, which limits the request to testimony or evidence PFS intends to use at hearing in opposing OGD's contention. The assertion that this request is "burdensome" is a conclusory statement that is unsupported by affidavit or even argument as to how the request is burdensome. Finally, the reference to "provide documents with respect to witnesses as agreed to with respect to other parties" is simply a disrespectful response to a party with a legitimate contention. OGD has made no such agreement and this response does not excuse PFS from its discovery obligations.

ANALYSIS CONCERNING DOCUMENT REQUEST No. 4

This request and Applicant's response are reflected below.

REQUEST NO. 4. For PFS and the companies involved in the formation and/or operation of PFS please produce the following documents: (a) the latest annual report, (b) all licenses or permits issued by any state or federal agency, (c) the latest filing with any public utility commission and/or corporations commission, (d) the latest filings with the Securities and Exchange Commission, (e) all licenses and/or permits authorizing the organization to do business in the State of Utah.

APPLICANT'S RESPONSE: Applicant objects to this Request as it requests information that is beyond the scope of OGD Contention O as admitted by the Board. See General Objection 3.

As noted in the arguments concerning interrogatories 4 and 5, OGD must be allowed to discover information describing PFS and the persons or

organizations that control PFS. This information is relevant to the basic subject matter of the litigation. For the reasons articulated previously, the Board should order PFS to provide a complete response.

ANALYSIS CONCERNING DOCUMENT REQUEST No. 5

The dispute regarding this request is the same as the previous request. The request and response state:

REQUEST NO. 5. Please provide copies of all articles of incorporation, by-laws, and partnership agreements that pertain to PFS, L.L.C.

APPLICANT'S RESPONSE: Applicant objects to this Request as it requests information that is beyond the scope of OGD Contention O as admitted by the Board. See General Objection 3.

The arguments raised regarding interrogatories 3 and 4 also apply to the dispute over this request. It is important to note that the Applicant is not claiming that the requested documents are privileged or that they contain confidential business information. Instead, the Applicant glibly claims that the limit of OGD's contention prevents the group from discovering information about PFS. When PFS is the subject of this litigation such an objection should not be permitted to obstruct the collection of basic foundational information

ANALYSIS CONCERNING REQUEST No. 7

REQUEST NO. 7. All documents that are directly or indirectly controlled by PFS, the Band, and/or Tribal Chairperson Leon Bear pertaining in any manner to: (a) any lease agreement(s) and/or other

contracts between PFS and the Band, the Band's attorney(s), and/or Chairperson Bear; (b) the payment of funds from PFS to the Band, the Band's attorney(s), and/or Chairperson Bear; (c) any promise made by PFS to provide to the Band, the Band's attorney(s), and/or Chairman Bear with funds; (d) all services provided to the Band, the Band's attorney(s), and/or Chairperson Bear by PFS.

APPLICANT'S RESPONSE: Applicant objects to this Request as it is overly broad and requests information that is beyond the scope of OGD Contention O as admitted by the Board. See General Objection 3. For example, the negotiations leading up to the lease are not related to the issues of disparate impact raised in OGD Contention O. Rather, it is the final lease, as negotiated and agreed to by PFS and the Band, that may be relevant insofar as it identifies payments and other benefits to the Band. In this regard, the Applicant has produced at Parson, Behle & Latimer's offices in Salt Lake City a copy of the lease which contains information on payments and other benefits to the Band which would be available to OGD for purposes of this proceeding upon executing an appropriate confidentiality agreement.

PFS is aware of no additional documents to produce at this time beyond those previously produced and made available by PFS and the Band. PFS will notify OGD upon updating the repository of documents relevant to the admitted OGD Contention O.

This request primarily concerns information about the Applicant's relationship with the Skull Valley Band of Goshutes. In its response, PFS admits that the final lease "may be relevant insofar as it identifies payments and other benefits to the Band." However, concerning the final lease, PFS requests that OGD sign a confidentiality agreement in order to receive a copy. PFS fails to articulate a basis for requiring such an agreement in its response, and is no longer timely to present such a basis to the Board. Consequently, the final lease must be released without condition to OGD.

The same logic that makes the final lease relevant for discovery purposes (i.e., payments and other benefits to the Band) also demonstrates

the relevance of similar information requested in subparts (b) through (d) of this request. OGD, which is almost entirely comprised of members of the Skull Valley Band of Goshutes, has yet to see an unredacted copy of the final lease or other benefits conferred or promised to the Band. Such basic information must not be denied to the party that is most closely connected to the site of the proposed facility.

ANALYSIS CONCERNING REQUEST No.s 8 - 10

REQUEST NO. 8. For each nuclear power facility that may provide waste to be stored at the proposed PFS facility please provide all documentation pertaining to any funding provided to that facility and/or the facility's owner and/or operator by the NRC and/or any other governmental agency.

APPLICANT'S RESPONSE: Applicant objects to this Request as it requests information that is beyond the scope of OGD Contention O as admitted by the Board. See General Objection 3.

REQUEST NO. 9. For each nuclear power facility that may provide waste to be stored at the proposed PFS facility please provide all documentation pertaining to any federal financial assistance provided to that facility and/or the facility's owner and/or operator by the NRC and/or any other governmental agency.

APPLICANT'S RESPONSE: Applicant objects to this Request as it requests information that is beyond the scope of OGD Contention O as admitted by the Board. See General Objection 3.

REQUEST NO. 10. Provide all documents pertaining in any manner to any funding and/or non-monetary assistance promised or received by PFS from the NRC, Department of Energy, and/or any other federal agency or program that assisted PFS in any manner in identifying the Skull Valley site and/or reaching an agreement to lease the Skull Valley site.

APPLICANT'S RESPONSE: Applicant objects to this Request as it requests information that is beyond the scope of OGD Contention O as admitted by the Board. See General Objection 3.

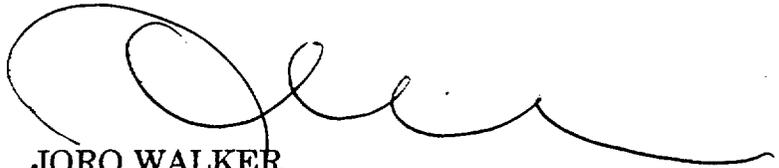
These requests seek documents pertaining to possible financial assistance provided to PFS or its partners by the NRC or other governmental agency. PFS argues again that these requests are beyond the scope of OGD's contention.

However, PFS fails to explain how these requests are outside the scope of OGD's contention. Furthermore, PFS' assertion is incorrect. For example, receiving information about funds provided by government agencies could lead to information regarding the safety and impacts high level nuclear spent fuel storage. Agencies sometimes fund certain industry activities in order to learn more about health and safety issues or to ensure improvement in health and safety protections. To the extent the NRC or other agencies have provided funding, such information may assist OGD in learning more about spent fuel storage and its impacts.

IV. CONCLUSION

For the reasons stated, the Board should compel complete responses to OGD's discovery requests.

Respectfully submitted,



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UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

Private Fuel Storage, a Limited Liability
Company;

(Independent Spent Fuel Storage
Installation).

Docket No. 72-22
ASLBP No. 97-732-02-
ISFSI
MAY 27, 1999

CERTIFICATE OF SERVICE

I hereby certify that copies of **Ohngo Gaudedah Devia's Motion to Compel Interrogatories and to Produce Documents Directed to the Applicant** were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 27th day of May 1999.

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