JUNE 11, 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
	)	ASLBP No. 97-732-02-ISFSI
(Private Fuel Storage Facility)	)	

INTERVENOR OHNGO GAUDEDAH DEVIA'S RESPONSE OPPOSING APPLICANT'S MOTION TO QUASH THE DEPOSITION OF LEON BEAR

Pursuant to Licensing Board Memorandum and Order dated August 20, 1998, and the Licensing Board's Order dated June 4, 1999, regarding discovery and summary judgment filings, Intervenor OGD submits this response in opposition to Applicant PFS's Motion to Quash the Deposition of Leon Bear. In support of its opposition OGD presents the arguments detailed below.

The Applicant attacks OGD's request to briefly extend the formal discovery period to take the deposition of Leon Bear by making several unpersuasive arguments. OGD will address these arguments in turn.

At the outset, PFS argues that, in making its motion, OGD failed to follow the rules articulated in the Board's September 23, 1997 Prehearing Order.[1] While OGD

[1] Furthermore, it is not clear that the provision that PFS cites applies to OGD's Motion to Extend the Discovery Period. Instead, the Order can be reasonably read to apply only to a motion to extend the time period in which a "pleading or submission" is due, rather than to a motion to extend the period of discovery. See Memo and Order at 7 (explaining that a party should serve a motion for an extension of time "at least three business days before the due date for the **pleading or other submission** for which an

acknowledges that it may not have achieved technical compliance with the Board's September 23, 1997 Memorandum and Order, OGD is entitled to a "good cause" exception to this order. As it previously explained, OGD was necessarily delayed in making its motion -- the issues highlighting the need for OGD to take Mr. Bear's deposition immediately did not become apparent until May 27, 1999, the day before the close of the formal discovery period.

During the period of May 26 to May 28, 1999, counsel for OGD met with OGD's Chair, Margene Bullcreek, to go over discovery responses being prepared for the Applicant.[2] PFS had submitted these discovery requests to OGD as recently as May 18, 1999 and May 13, 1999. At the same time, the purpose of the May 26 to May 28 meetings was to discuss with Ms. Bullcreek the adequacy of PFS' responses to OGD's discovery requests which were filed only on May 20, 1999. It is important to note that Ms. Bullcreek lives almost 100 miles away from the Salt Lake City office of her attorneys and can not make the journey frequently.

Therefore, it was not until these meetings of May 26 to May 28 that counsel for OGD became aware of the potential significance of the Skull Valley Band of Goshutes' statements to the Staff of the Nuclear Regulatory Commission (NRC) in February and the more recent resolutions passed by the Band. It was the extensive review of information with counsel and client present that triggered the realization that it was

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extension is sought"). Importantly, a discovery period establishes the time in which discovery should be completed and various notices and requests should be filed with the other parties (rather than the Board). However, the discovery period itself is not a pleading or other submission.

[2] In making references to the circumstances on or before May 27 that prompted the need to take Chairman Bear's deposition, OGD does not waive its attorney-client or work product privileges.

critical to OGD's case and its ability to proceed with this matter to depose Mr. Bear as soon as possible. Consequently, counsel did not have the necessary three days within which to perfect an extension request in full compliance with the rules specially set forth for this case.

While the February 18,1999 date of Chairman Bear's statements to the NRC is relevant, it does not represent the date at which counsel for OGD became aware of its immediate need to depose Mr. Bear. The same is true of the April 24 date of the Tribal Council meeting. Rather, it was not until the aforementioned events transpired, when Ms. Bullcreek was able to obtain relevant materials and discuss these events with counsel during May 26 to May 28 that OGD became aware of the full implications of these events and the need to depose Chairman Bear.[3]

PFS takes further issue with the fact that OGD did not submit an affidavit to support its Notice of Deposition or its Motion to Extend the Discovery Period. However, given that the circumstances of this case entail that such an affidavit would almost necessarily compromise the attorney-client and work product privileges, counsel decided not to provide the affidavit of Ms. Bullcreek to verify the stated facts. Rather,

[3] It should be understandable that with the mountains of paper filed in this case occasionally the client may not appreciate certain issues or make necessary connections as immediately as may be necessary to meet all pre-hearing deadlines. With a case of this complexity and magnitude, OGD hopes that it will be given some leeway in order to fully protect its position in this litigation. As the events that caused OGD to focus on Mr. Bear as a possible deponent took place in February (statement to NRC) and April (Tribal Council meeting and resolutions), the Applicants suggestion to wait until the next discovery window will not suffice because the delay will be too great and may cause the loss of information.

counsel provided "good cause" for the delayed request for an extension and that the extension will do no harm to the other parties.[4]

Furthermore, that OGD's counsel signed its Motion to Extend the Discovery Period provides ample support for its motion. After all, by signing the document, counsel states that, to the best of her knowledge and belief, the contents of the motion are true. 10 C.F.R. § 2.708 (c) ("The signature of a person signing in a representative capacity is a representation that the document has been subscribed in the capacity specified with full authority, that he [or she] has read it and knows the contents, that to the best of his [or her] knowledge, information and belief the statements made in it are true, and that it is not interposed for delay"); see also, Rule 11, Federal Rules of Civil Procedure. Finally, it is important to note that counsel for PFS makes assertions regarding the content and confidentiality of the Tribal Resolutions and meetings without a supporting affidavit.

PFS next argues that OGD need not or should not be allowed to depose Chairman Bear because OGD seeks confidential and/or proprietary information. Furthermore, OGD could have access to this information if it were to sign a confidentiality agreement with PFS. However, what PFS ignores is that the information relevant to OGD's contention which it seeks to gain in deposing Chairman Bear goes beyond the mere elements of the lease agreement. Importantly, PFS' "understanding" of the content of these highly important resolutions and the Tribal

[4] The Applicant's claims of a demanding discovery schedule are irrelevant to OGD's request because the deposition of Mr. Bear can be re-scheduled so as to limit any unnecessary scheduling problems.

Council meeting differs radically from OGD's understanding of these same tribal actions and events. Based on privileged discussions with its counsel, OGD believes that these highly impactful resolutions and proceedings are much wider in scope than any confidential or proprietary documents offered to OGD by PFS such as the PFS lease agreement with the Skull Valley Band of Goshutes or payments to the Band. See PFS's Motion to Quash at 4. Rather, the content of the resolutions and the events of the Tribal Council meeting relate directly to information Chairman Bear gave to the NRC relating to OGD's environmental justice claim and to the ability of OGD to participate effectively in this proceeding. Without the ability to depose Chairman Bear, OGD could effectively be prohibited from continued participation in this case and from effectively responding to statements already before the NRC which may be incorporated in the EIS relevant to the proposed facility.

PFS next mistakenly suggests that OGD should wait until the next discovery window to depose Chairman Bear. Clearly, OGD cannot wait until some time late 2000 to early 2001, as provided by the five-month discovery window, to depose Mr. Bear. As established above, the issues relevant to the deposition are so significant that they directly impact information which will be incorporated into the EIS studying the proposed project and impact the ability of OGD to participate in this proceeding.

Finally, the PFS statement that OGD has never responded to its request that OGD sign a confidentiality agreement is not correct. Rather, OGD has consistently maintained that the lease between PFS and the Skull Valley Band is not confidential or proprietary and that PFS has never set forth to this Board even remotely sufficient

arguments or facts to establish that it is. Indeed, OGD is understandably taken aback that its members who are tribal members such as Ms. Bullcreek have never seen the lease (even a redacted version) that they supposedly have voted on in an informed fashion and must file a FOIA request in their attempts to do so. See Response to EIS Request for Additional Information (ER-1), February 18, 1999 (Skull Valley Band of Goshute Responses at 9, "Since the Band . . . have [sic], on record, a resolution of the General Council (consisting of all adult enrolled members of the Band) approving [of] and supporting the development and operation of the facility. . ."). Furthermore, it is important to note that PFS has further emphasized the need for public disclosure of the lease (or at least its terms) when it states that the Band is a "willing jurisdiction." Id. Thus, it is PFS that has focused the attention of this proceeding on the supposedly confidential and proprietary information contained in the lease and the proceedings and resolutions of the Skull Valley Band.[5]

In sum, OGD has established that it has good cause for requesting a slight extension of the discovery period in order to depose Chairman Bear and that unless it is allowed to depose Chairman Bear now, and not in the year 2000 or 2001, it will be highly prejudiced. OGD has shown that it is PFS's reliance on the statements of Chairman Bear and the content of the recent events at the Tribal Council coupled with

[5] PFS also argues that OGD should not reference the PFS May 20 refusal to provide OGD with the lease between PFS and the Skull Valley Band as reason for extending the discovery period. PFS Memo at 5. PFS states that OGD already knew of PFS' position with regard to disclosure of the lease. However, it was highly reasonable for OGD to believe that PFS might respond to OGD's **formal discovery** request differently than to its informal discovery request. If this were not true, OGD wonders why distinguish between the two discovery periods at all.

the recent inability of Ms. Bullcreek to obtain and discuss relevant information to these events which precipitated the need to depose Chairman Bear at this time. Furthermore, because OGD will do all it can to accommodate the busy schedules of Chairman Bear and PFS, the deposition will not prejudice the other parties.

Thus, for the reasons stated above, OGD respectfully requests that its Motion for an Extension of the Discovery Period be granted and PFS' Motion to Quash OGD's Notice of Deposition of Leon Bear be rejected. OGD should be allowed to depose Mr. Bear on June 16, 1999 or some other date in the near future that better accommodates the schedules of PFS and Chairman Bear.

Dated this June 11, 1999.

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Private Fuel Storage, a Limited Liability Company; (Independent Spent Fuel Storage Installation).	Docket No. 72-22 ASLBP No. 97-732-02-ISFSI **JUNE 11, 1999**

CERTIFICATE OF SERVICE

I hereby certify that copies of **Intervenor Ohngo Gaudedah Devia's Response Opposing Applicant's Motion to Quash the Deposition of Leon Bear** 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 11th day of June 1999.

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