

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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))	April 29, 1999

**STATE OF UTAH'S RESPONSE TO APPLICANT'S
MOTION TO COMPEL ANSWERS TO INTERROGATORIES
AND ADMISSIONS BY THE STATE OF UTAH**

I. INTRODUCTION

The State hereby responds to Applicant's Motion to Compel Answers to Interrogatories and Admissions by the State of Utah (April 22, 1999) ("Motion"), in which the Applicant claims that the State's responses to the Applicant's First Set of Formal Discovery Requests were "evasive and incomplete." Motion at 1. As discussed below, the Motion to Compel is without merit. The State has diligently answered the Applicant's discovery fully and directly, based on the information that it has been able to obtain and review to date. The State also recognizes that it is under a continuing obligation to supplement its responses to Applicant's discovery as it obtains additional information. Filed herewith are additional responses to Applicant's discovery and the State anticipates that it will continue to supplement its responses throughout the discovery period. Therefore, the Motion should be denied.

II. ATTEMPTS TO INFORMALLY RESOLVE THE MOTION TO COMPEL

On April 21, 1999, one day before the deadline for filing the Motion to Compel, PFS contacted the State about informally curing perceived deficiencies in the State's discovery response. The State and PFS were able to reach agreement on some issues. See Exhibit 1, letter from Denise Chancellor to Ernie Blake and Paul Gaukler, dated April 22, 1999. The State is today filing an Amended Response to the Applicant's First Set of Discovery Requests, honoring the commitments it made during the informal resolution, and where possible amending other responses.

As discussed in Section III.A below, the State also attempted to resolve the Applicant's concern that it has not fully disclosed information in its possession; however, the Applicant continues to press this claim in its Motion.

III. ARGUMENT

The Motion to Compel is based on three claims: (a) the State "did not provide PFS with information currently in its possession"; (b) Applicant's requests for admission should be granted because the State did not squarely admit or deny certain admissions; and (c) the State did not directly and completely answer certain interrogatories. Motion at 2. Contrary to these arguments, the State has fully complied with the NRC rules of discovery in responding to the Applicant's First Set of Discovery Responses. The State either answered interrogatories or stated its objections to them as required by 10 CFR § 2.740b. It also answered requests for admissions and in relevant instances set forth

reasons why it could “neither truthfully admit nor deny them.” 10 CFR § 2.742(b).

A. The State Has Provided All Information In Its Possession.

In its April 21, 1999 e-mail letter, the Applicant complained that the State “had not produced the information it has now.” The State clarified that with respect to document production, it has provided PFS with all of the non-privileged documents it currently possesses and is aware of. *See* Exh. 1. The State has been very liberal in opening up files at all State agencies for the Applicant’s review, inspection and copying.¹ The State has copied and sent more than 37,800 pages of documents to PFS and PFS has probably reviewed about twice that number of documents contained in files at various State agencies.

With respect to interrogatory and admissions answers, the State explained that it has answered the discovery to the best of its ability, based on the information that it currently possesses and has been able to review. The State is attempting to obtain information over which the State has no direct control. In particular, the State is attempting to obtain information from the U.S. military about its activities that may affect the proposed facility. However, most of the information sought by the State is not available at a public location such as a library and may only be acquired based on the responsiveness of an agency under a Freedom of Information Act request.

¹ The State has even gone the extra mile by using its own data bases to generate unique documents specifically containing information in the format requested by the Applicant, with respect to fire history in certain ranges and townships in Skull Valley, hazardous waste permitting actions for specific entities, and incident report and hazardous waste spill reports by location.

The State is surprised to see the same assertion that it is holding back discovery information repeated in the Motion to Compel at 2. The State has provided all of the information it has in its discovery answers. The following more detailed information is provided with respect to specific contentions.

1. Contention M

The State attempted to amend its responses to Contention M. However, a series of personnel staffing conflicts conspired against the desired effort. The State must rely on the assistance and expertise of David B. Cole to amend its responses. Unfortunately, Mr. Cole is on emergency family leave and is not expected back in the office until Friday, April 30. See Exhibit 2, Affidavit of Norman E. Stauffer, Jr. The State attempted to work with other technical State personnel but they were unable to assist because they were not familiar with all of PFS's and the State's relevant documents and were not in a position to immediately review Mr. Cole's work or to develop their own calculations. The State will amend its response next week after it consults with Mr. Cole.

2. Contention K

The Applicant alleges that the State has not come forward with information and data to specify the hazards and activities that would threaten the ISFSI or Intermodal Transfer Facility (ITF). Motion at 4. The Applicant misinterprets the State's response that because it is still collecting and reviewing information this somehow means that the State did not provide all information it currently possesses. Motion at 2. As stated

above, the State informed the Applicant that all relevant non-privileged documents relating to Utah Contention K have been produced.² Many of the 37,800 pages of document copied and sent to the Applicant relate to industrial or military installations at issue in Contention K.

During informal discovery, the Applicant broadly requested documents within the State's control relating to military and industrial facilities and information concerning hazardous waste and material spills. In an effort to cooperate, the State located and produced a multitude of documents, in particular for Utah Contention K, even though many of the documents had no relevance to admitted contentions. This effort involved a significant time commitment by the State – time that was taken away from the State in developing its case.

In addition, during informal discovery the State openly allowed the Applicant to interview previously identified knowledgeable persons and others identified by the Applicant. The informal interviews gave the Applicant a broader understanding of wildfires and State-regulated facilities located in Tooele County and led to the discovery and production of additional documents.

The State has produced all reasonably known documentation of incidents within its control. However, the State is currently pursuing additional documents that may be relevant to Utah Contention K. For example, in a reply pleading relating to Contention

² The State and the Applicant are still continuing to exchange documents from informal discovery requests and the few remaining outstanding documents will be produced shortly.

K, the State mentioned a 1997 errant advanced cruise missile that crashed two miles from its intended target at Dugway Proving Ground. State's Reply to NRC Staff's and Applicant's Responses to State's Contentions at 55. Recently, the U.S. Air Force published a report relating to the investigation and findings of that cruise missile crash. The State has requested copies of this report. In addition, the State provide the Applicant with the title of the document so it may simultaneously pursue the document if it wished.

Military incident reports are not released until the military completes its investigation and findings. These reports may not be completed for a significant time following an incident. The State has no control over the investigation nor the release of its findings. Moreover, the State cannot produce documents not within its control.

B. The State's Responses to Requests for Admissions Are Adequate.

Rather than denying request for admissions outright, the State denied 28 request for admissions³, in whole or in part, on the basis of information and belief.⁴ The State responded in this manner, not to be evasive or cause unnecessary delay, but because it clearly wanted the record to reflect that the State's discovery and investigation are currently ongoing and that an outright denial or admission was not feasible at this time.

Contrary to the Applicant's argument, the State did set forth "in detail" the

³ Request for Admissions nos. 1, 3, 13, 21, 36, and 37.

⁴"Information and Belief" is defined as "after making reasonable inquiry into the subject of the discovery, the State lacks sufficient information or belief on the subject or subjects therein embraced, on which to either deny or admit the request, and therefore, the request is denied." State's Response to Applicant's 1st Set of Discovery Requests at 2-3.

reasons why the admissions can neither be truthfully denied or admitted. Motion at 8. The State's general objection no. 3 states that it is "reviewing many thousands of pages of discovery materials produced by PFS, and also anticipates that it will obtain more relevant information through discovery against PFS." State's Response to Applicant's First Set of Discovery Requests at 2. The State is not claiming that there are "some" documents that it is reviewing but that it is specifically reviewing documents obtained from PFS through discovery. Surely, the Applicant does not expect the State to identify which documents it is currently reviewing.

In addition, the State in qualifying its responses to Contention K stated with specificity why it could not admit or deny requests for admissions related to potential significant hazards posed by military facilities.⁵ Such hazards are critical to Contention K because 10 CFR § 72.94 requires the Applicant to "examine ... both past and present man-made facilities and activities that might endanger the proposed ISFSI" and examine "[t]he important potential man-induced events that affect the ISFSI."

The Applicant paints with too broad a brush by complaining that the State in denying an admission on information and belief it did so "without further explanation." Motion at 2. With respect to Contention R, the Applicant wants the Board to deem as admitted Admission Nos. 1 through 5. Motion at 10. Admissions 1 through 4 contain

⁵ Part of the qualification stated: "the existing significant hazard posed on the PFS ISFSI or ITP is unknown due to the potential for buried chemical, biological, or conventional agents or munitions at unknown on or off military installation locations." State's Resp. at 20.

specific information describing why the State has insufficient information or belief to make an admission. For example, the State pointed out that it was unable to admit that the Applicant will have sufficient equipment or water on site to fight fires because the Applicant's RAI responses omitted important details necessary to evaluate the Applicant's requested admissions. The State described the types of details that were missing from the RAI responses. Finally, Admission No. 5 broadly asks whether "PFS will have sufficient capability to fight fires onsite at the PFS ISFSI." The State answered as it did because the required information is in PFS's control. However, the State willingly changes its answer to this admission as an absolute denial.

The State has met the standards in 10 C.F.R. § 2.742(b) by stating that it could not admit or deny the request for admissions because of 1) the breadth or the ambiguity of the request, 2) unknown future activities or discovery at military facilities, 3) the current status of the State's review of documents and information obtained from the Applicant, 4) ongoing efforts to obtain additional relevant documents not in the State's control, and 5) the ongoing State's analysis. The State has satisfied the standard for admissions; therefore, PFS should not be granted the relief it seeks, which is that the admissions should be deemed to be made.

C. The State Provided Adequate Answers to PFS's Interrogatories.

With regard to the State's response to its interrogatories, the Applicant complains that "the State cites generic categories of hypothetical hazards, but produces no

information or data specific to the facilities and activities” and that “[i]t is one thing to raise such broad, hypothetical concerns at the contention stage, but it is insupportable at this stage of the proceeding.” Motion at 4. This argument is without merit. The State fully responded to the interrogatories in good faith based on the current state of its investigation and assessment.

The Applicant chose to locate its facility in an area surrounded by past and existing dangerous military and commercial activities. Under the regulations, it is the Applicant’s responsibility to quantify the cumulative risks to the proposed ISFSI from potential hazards. 10 CFR § 72.94. After reviewing the Application as amended, the responses to RAIs, and documents produced during discovery, the State found that the Applicant’s effort was woefully deficient. For example, in its application, the Applicant dedicates only a little over three pages to a discussion of nearby industrial, transportation, and military facilities.

The State responded to Interrogatories No. 1 and No. 2, by describing the incidents and hazardous materials that may pose a threat to the proposed ISFSI. These potential man-induced events and potential hazards to the ISFSI are ones that the Applicant should have analyzed. However, because no such analysis was done, the State responded to Interrogatory No. 3 by describing how the State is analyzing significant high hazard activities and materials that may impact the proposed ISFSI. Likewise in responding to Interrogatories No. 4 and No. 5, the State answered based on the state of its

investigation and review given the status of the Applicant's efforts to date. Finally, in Interrogatory No. 7 the State gave a full response to the threat of wildfires to the proposed ISFSI or ITF given information available to the State, such as to how PFS will use (or not use) its fire brigade, personnel training and availability of equipment and supplies.

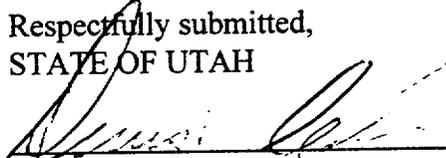
The State has fully responded to all interrogatories. The State has not secreted any information from the Applicant. Moreover, the Applicant's lack of analysis should not count against the State's effort to bring its case to fruition.

IV. Conclusion

The State fully and completely answered all of the Applicant's discovery requests. Accordingly, the Applicant's Motion to Compel should be dismissed.

DATED this 29th day of April, 1999.

Respectfully submitted,
STATE OF UTAH


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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S RESPONSE TO APPLICANT'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND ADMISSIONS BY THE STATE OF UTAH was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 29th day of April, 1999:

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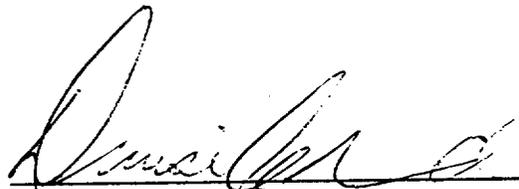
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