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 (Independent Spent Fuel Storage Installation)	)	ASLBP No. 97-732-02-ISFSI
	)	April 30, 1999

STATE OF UTAH'S MOTION TO COMPEL APPLICANT TO RESPOND TO STATE'S FIRST SET OF DISCOVERY REQUESTS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.742, the State of Utah hereby moves the Board to compel the Applicant, Private Fuel Storage, LLC ("PFS") to answer certain interrogatories, admissions, and requests for documents propounded by the State in State of Utah's First Set of Discovery Requests Directed to the Applicant [Redacted Version] (April 9, 1999) ("State's Discovery Requests"). This Motion to Compel relates to Utah Contention C. Separately, the State is also filing a Proprietary Motion to Compel, which relates to Utah Contention H. PFS's objections to the discovery are without merit, and therefore PFS should be required to answer.

FACTUAL BACKGROUND

On April 21, 1999, PFS filed Applicant's Objections and Non-Proprietary Responses to State's First Request for Discovery ("Applicant's Objections"). The Applicant objects to virtually all of the discovery regarding Contention C (Dose

Calculations).

On April 29, 1999, counsel for the State wrote a letter to counsel for PFS, explaining the principal grounds for the State's anticipated Motion to Compel, and seeking informal resolution of the discovery dispute. PFS continued to refuse to answer any portion of the disputed discovery, and hence this Motion to Compel is being filed today.

ARGUMENT

I. THE COMMISSION'S STANDARD FOR DISCOVERY IS ONE OF BROAD RELEVANCE TO ADMITTED CONTENTIONS.

The scope of allowable discovery is set forth in 10 C.F.R. § 2.740(b)(1). Unless otherwise determined by the Presiding Officer, discovery extends to "any matter, not privileged, which is relevant to the subject matter involved in the proceeding." *Id.* The Commission gives its discovery rules the same "broad, liberal interpretation" that is given to the discovery rules of the U.S. Federal Courts. *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 461-62 (1974). Discovery is considered relevant unless it is "palpable that the evidence sought can have no possible bearing upon the issues." *Id.*, 7 AEC at 462, *quoting Hercules Powder Co. v. Rohn & Haas Co.*, 3 F.R.D. 302, 304 (D. Del. 1943). A motion to compel need not seek information which would be admissible *per se* in an adjudicatory proceeding, and need only request information which "reasonably could lead to admissible evidence." *Safety Light Corp.* (Bloomsburg Site Decontamination), LBP-92-3A, 35 NRC 110, 111-12 (1992);

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-102, 16 NRC 1597, 1601 (1982); *Commonwealth Edison, supra,* 7 AEC at 462.

II. THE DISCOVERY SOUGHT BY THE STATE ON CONTENTION C IS RELEVANT AND HAS NOT BEEN MOOTED.

The admitted portions of Contention C charge that the Applicant has failed to demonstrate a reasonable assurance that NRC dose limits can and will be complied with in the following respects:

> 1. License Application makes selective and inappropriate use of data from NUREG-1536 for the fission product release fraction;
> 2. License Application makes selective and inappropriate use of data from SAND80-2124 for the respirable particulate fraction.
> 3. The dose analysis in the License Application only considers dose due solely to inhalation of the passing cloud. Direct radiation and ingestion of food and water are not considered in the analysis.

LBP-98-7, 47 NRC 142, 251 (1998).

The State's discovery requests with respect to Contention C inquire into various calculations made recently by PFS, which apparently are intended to resolve the concerns raised by Contention C. *See* State's Discovery Requests at 16-21. These calculations are described in attachments to a February 11, 1999, letter from PFS to the NRC Staff, responding to the Staff's Second Round Requests for Additional Information ("RAIs"). Letter from John L. Donnell to Mark Delligatti ("February 11 Letter"). The relevant attachments to the February 11 Letter consist of two reports by PFS's contractor, Dade Moeller and Associates: UR-010, "RESRAD Pathway Analysis Following Deposition of Radioactive Material From the Accident Plumes" (February 9, 1999), and UR-009,

"Accident Dose Calculations at 500 m and 3219 m Downwind for Canister Leakage Under Hypothetical Accident Conditions for the Holtec MPC-68 and SNC TranStor Canisters" (February 9, 1999). As discussed in the State's Discovery Request at 16, the revised calculations in these reports make a number of assumptions whose bases are unexplained. Therefore, the State has propounded 11 Requests for Admissions, nine Interrogatories, and one Document Request seeking further information regarding the bases for these calculations.

PFS refuses to answer any of the requested discovery on Contention C, based on two objections which are discussed below.

Objection 1

PFS objects that the discovery is beyond the scope of the admitted contentions and not likely to lead to the discovery of admissible evidence, because it relates to new calculations that do not use information from either NUREG-1536 or SAND80-2124, as well as new calculations that consider other applicable dose pathways in addition to inhalation from a passing cloud. Applicant's Objections at 30. Thus, according to PFS, the State's discovery requests should be barred because they "do not seek information related to the specific claims raised in Utah C as admitted by the Board." *Id.* at 31. PFS also argues that because it has done new calculations that do not rely on NUREG-1536 or SAND80-2124 and which include other pathways besides the inhalation dose, "the Applicant is now consistent with the specific points raised by the State in Utah C and the

claims raised by the contention are now moot." *Id.* at 30. These arguments are specious.

First, the requested discovery is quite relevant to the admitted portions of Contention C. It appears from the two reports submitted with PFS's February 11 Letter that PFS is no longer confident about relying on NUREG-1536 or SAND80-2124 in its license application. Therefore, PFS has performed additional calculations using an alternative method, suggested by the Staff in a recent guidance document, which does not rely on NUREG-1536 or SAND80-2124. Spent Fuel Project Office, Office of Nuclear Material Safety and Safeguards, Interim Staff Guidance (Approved November 1, 1998). In fact, it appears that the guidance document was issued specifically for the purpose of giving PFS a way to get around the issues raised by subparts 1 and 2 of Contention C. Although PFS has performed calculations using this guidance, it has not amended its license application to alter its previous reliance on NUREG-1536 and SAND80-2124. Thus, the new calculations are relevant because they seek information regarding the manner in which PFS is considering compensating for or altering its reliance on NUREG-1536 and SAND80-2124. Similarly, the new calculations are also relevant to basis 5 of Contention C because they seek information regarding the way in which PFS is considering altering its license application to provide the information that the State seeks.

If PFS is considering changes or additions to the calculations challenged in Contention C, the State is entitled to inquire why, and whether any alternative under

consideration is sufficient to address its concerns. It is simply absurd to suggest that such discovery is beyond the scope of relevant information.

Moreover, PFS's argument that it has somehow mooted Contention C by submitting some new calculations to the NRC is both baseless and inconsistent with NRC regulations and case law. As far as the State is aware, PFS has submitted no amendment to its License Application or Safety Analysis Report ("SAR") for the PFS facility that would change the aspects of the license application that are challenged in Contention C. Certainly, PFS submitted no amended license application or SAR with its February 11 Letter. This stands in sharp contrast to PFS's correspondence regarding the substitution of the Low Rail corridor for the Rowley Junction Intermodal Transfer facility, for example, for which PFS attached a license application amendment to its correspondence with the NRC Staff. In the absence of any such application revision, the State must assume that the new calculations are provisional and that the application remains the same as it was when it was filed; in other words, that PFS continues to rely on NUREG-1536 and SAND80-2124, and that PFS has not revised its application to provide additional dose calculations other than for the passing cloud.

PFS's presumption that the February 11 submittals moot contention C is inconsistent with NRC regulations and case law governing licensing hearings. The NRC has made it quite clear in its regulations and case law that the focus of a licensing hearing is the *application.* Thus, for instance, the regulations governing admissibility of

contentions require intervenors to focus their dispute with the applicant on "specific portions of the application." 10 C.F.R. § 2.714(b)(2). The Licensing Board also made this quite clear in LBP-98-7, by holding that "a contention that fails to directly controvert the license application at issue . . . is subject to dismissal." *Id.* at 181. Consistent with the regulations and the Board's holding, the State based Contention C on PFS's license application, and continues to focus its contentions on the application, which has not changed with respect to dose calculations since it was filed. To hold that mere correspondence can moot a contention that is based on the license application would be utterly inconsistent with these requirements and precedents.

To uphold PFS's objection would also be unfair and prejudicial to the State. A licensing proceeding must be conducted with procedural fairness and regularity, including clarity with respect to those events that trigger intervenor obligations. The State has not considered it necessary to amend Contention C in order to maintain its vitality, because there has been no amendment to the license application. In making this determination, the State reasonably relied on long-established Commission precedent that the application itself is the focus of the hearing, and that changes to the application itself are the triggering events which require amendments to contentions. To allow PFS to now shift the target for amending contentions such that a mere piece of correspondence could be considered to moot Contention C would be most unfair and prejudicial to the State.

PFS's presumption that it has mooted Contention C is also inconsistent with

long-established NRC Staff practice. It is the State's experience that the NRC generally requires such commitments to be accompanied by change sheets showing the amendment to the application. This is necessary because once a license is issued, the license application generally becomes the blueprint for the details of what the license requires. If license applications could be amended merely by correspondence, it would be difficult to determine what exactly a license consists of once it is issued.

Finally, although PFS has filed a summary disposition motion with respect to Contention C, that motion has not even been answered, let alone granted. Unless and until the Board dismisses Contention C, it remains viable, and the State is entitled to seek discovery on any "relevant" matter. 10 C.F.R. § 2.740(b).

Objection 2

PFS also objects to Requests for Admission 8-11 and Interrogatory 9 on the ground that they relate to the subject of nuclear sabotage, which the Licensing Board has excluded from the proceeding. PFS's argument is incorrect, and confuses the admissibility of a contention with the relevance of discovery. These discovery questions attempt to obtain relevant information about PFS's assumptions regarding the nature of the accident that is evaluated in the SAR for purposes of making dose calculations. Subparts 1 and 2 of Contention C relate to the consistency of PFS's assumptions regarding the nature of the bounding accident that is analyzed, *i.e.*, whether the cask lid is removed, what portion of the cladding is open to the environment, and the fraction of

respirable particles that is released. In the SAR, PFS questioned the credibility of lid removal. In its RAI correspondence, PFS appears to be attempting to avoid the issue entirely. Nevertheless, as discussed in the Basis of Contention C, the scenario examined in the dose analysis is relevant because the assumptions regarding the particulate release fraction and the respirable particulate fraction are based on the behavior of the materials under predicted accident conditions. State of Utah's Contentions at 19-20 (November 23, 1997). In its SAR, PFS assumes that the lid is removed from the cask and that 100% of the cladding is exposed to the environment. Then, PFS asserts specific fractions of particulates are considered respirable. In its most recent RAI calculations, PFS assumes only that the cask has a minor leak. The State's inquiries regarding PFS's views on the potential causes of accidents are relevant to the Contention, because they seek information regarding the reasons for and the reasonableness of PFS's proposed change in its assumptions.

CONCLUSION

For the foregoing reasons, the Applicant's objections to the State's first set of discovery requests on Contention C are without merit. Therefore, PFS should be ordered to answer the discovery.

DATED this 30th day of April, 1999.

Respectfully submitted,

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DECLARATION OF DR. MARVIN RESNIKOFF

Under penalty of perjury, I, Dr. Marvin Resnikoff, declare that I am the State's qualified expert with respect to Contention C, that the foregoing factual assertions regarding the nature of and bases for Contention C are true and correct to the best of my knowledge and belief, and that the foregoing statements regarding relevance of the requested discovery on Contention C are based on my best professional judgment.

_____

Dr. Marvin Resnikoff

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Dr. Marvin Resnikoff

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S MOTION TO COMPEL APPLICANT TO RESPOND TO STATE'S FIRST SET OF DISCOVERY REQUESTS was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 30th day of April, 1999:

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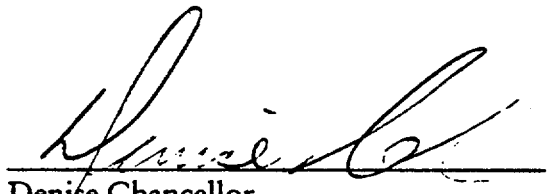

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