December 21, 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)	)	ASLBP No. 97-732-02-ISFSI

APPLICANT'S OPPOSITION TO STATE OF UTAH'S MOTION TO COMPEL ON THE STATE'S FOURTH SET OF DISCOVERY REQUESTS

On December 14, 1999, the State of Utah filed "State of Utah's Motion to Compel Applicant to Respond to State's Fourth Set of Discovery Requests," [hereinafter State Mot.].[1] Pursuant to 10 C.F.R. § 2.730(h), Private Fuel Storage L.L.C. ("Applicant" or "PFS") files this answer opposing the motion. The State seeks to compel PFS to respond to State discovery requests concerning Contention Utah E, specifically Requests for Admission Nos. 3-8 and Document Requests Nos. 5-8 and 13-14. State Mot. at 1, 6. PFS objected to theses requests on the grounds that they were not reasonably calculated to lead to the discovery of relevant information, in that PFS has made commitments regarding the financing of the Private Fuel Storage Facility ("PFSF") that render moot the issues to which the State's discovery requests pertain. See PFS Resp. at 4-8, 12-14, 16-

[1] See State of Utah's Fourth Set of Discovery Requests Directed to the Applicant and Skull Valley Band of Goshutes with Respect to Group II Contentions [Proprietary Version] (November 19, 1999) [hereinafter State Req.]; Applicant's Objections and Responses to State of Utah's Fourth Set of Discovery Requests and Supplemental Responses to State of Utah's Third Set of Discovery Requests [Proprietary Version] (December 6, 1999) [hereinafter PFS Resp.].

18.[2] Further, PFS has filed a motion for partial summary disposition of Contention Utah E that, if ruled upon in PFS's favor, will render moot the State's motion to compel by resolving in PFS's favor those aspects of the contention to which the challenged discovery pertains. Therefore, PFS asks the Board to deny the State's motion on the grounds that the State's requests seek material not reasonably calculated to lead to the discovery of information relevant to the contention. In the alternative, should the Board prior to ruling on the State's motion decide in PFS's favor on its motion for summary disposition of Utah E, PFS asks the Board to dismiss the State's motion to compel as moot, in that it would pertain to matters no longer within the scope of this proceeding, i.e., the dismissed portions of Utah E.

I. BACKGROUND

On November 19, 1999, the State filed its "Fourth Set of Discovery Requests . . . with Respect to Group II Contentions," which included discovery requests pertaining to Utah E. See State Req. at 11-21. On December 3, 1999, PFS filed its motion for partial summary disposition of Utah E, requesting the Board to dismiss Bases 1-5 and 7-10 on the grounds that: 1) they had been rendered moot by PFS's commitments on the financing of the construction and operation of the PFSF, 2) they were legally groundless, or 3) they had been satisfied by PFS. PFS Utah E Mot. at 4-5.

PFS's financial commitments are as follows: 1) PFS will not begin construction of the PFSF until it has committed funding sufficient to fully cover the cost of construct-

[2] See also Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (December 3, 1999), at 5-10 [hereinafter PFS Utah E Mot.].

ing a facility with a storage capacity of a fixed minimum number of spent fuel storage casks, whether these funds are obtained through equity contributions, through Service Agreements, or through other forms of committed forms of financing, and 2) PFS will not commence operation of the PFSF until it has entered into long term Service Agreements with its customers sufficient to fully cover the costs of operating and maintaining the PFSF, including the amortization of any debt used to finance construction of the PFSF. PFS Utah E Mot. at 7-8.[3]

On December 6, 1999, PFS filed its objections and responses to the State's discovery requests. See PFS Resp. at 2-22. It objected to the Utah E requests that are the subject of the State's motion to compel on the grounds that they were not reasonably calculated to lead to the discovery of relevant information, in that the issues to which they pertained were rendered moot by PFS's financial commitments. Id. at 4-8, 12-14, 16-18.[4]

Contention Utah E, as admitted by the Board and to which the discovery requests that are the subject of the State's motion to compel allegedly pertain, claims, in pertinent part:

---

[3] The precise storage capacity of the facility to which PFS has committed to obtaining funding is proprietary information. See id. at 7-8. PFS made its formal commitment on construction financing in response to an NRC Staff RAI on September 15, 1998. It made its formal commitment on operating and maintenance costs in its motion for summary disposition of Utah E on December 3, 1999.

[4] In discussing its motion to compel concerning State Document Requests No. 13 and 14, the State refers to ongoing discussions for certain aspects of the Supko Study, but these discussions do not concern State Document Requests No. 13 and 14. Specifically, PFS is now working with the State to facilitate its entry into an agreement with Energy Resources International, Inc. for the protection of proprietary information so that the State may obtain access to the electronic spreadsheets that supported the Supko Study, but this Study is the subject of State Document Requests Nos. 10-11 (on which the State has not moved to compel). State Document Requests No. 13 and 14, in which context the State references this effort, see State Mot. at 9-10, seek material concerning only the need for spent fuel storage. Hence, these requests do not seek material relevant to PFS's financial qualifications for the reasons discussed infra. Thus, PFS has objected to those requests. See PFS Resp. at 16 and 17and compare to PFS Resp at 15.

Contrary to the requirements of 10 C.F.R. §§ 72.22(e) and 72.40(a)(6), the Applicant has failed to demonstrate that it is financially qualified to engage in the Part 72 activities for which it seeks a license in that:

1. The information in the application about the legal and financial relationship among the owners of the limited liability company ["LLC"] (i.e., [PFS]) is deficient because the owners are not explicitly identified, nor are their relationships discussed.
2. PFS is [an LLC] with no known assets; because PFS is [an LLC], absent express agreements to the contrary, PFS's members are not individually liable for the costs of the proposed PFSF, and PFS's members are not required to advance equity contributions. PFS has not produced any documents evidencing its members' obligations, and thus, has failed to show that it has a sufficient financial base to assume all obligations, known and unknown, incident to ownership and operation of the PFSF; also, PFS may be subject to termination prior to the expiration of the license.

. . . . .

7. The Applicant must document an existing market for the storage of spent nuclear fuel and the commitment of sufficient number of Service Agreements to fully fund construction of the proposed ISFSI. The Applicant has not shown that the commitment of 15,000 MTUs is sufficient to fund the Facility including operation, decommissioning and contingencies.
8. Debt financing is not a viable option for showing PFS has reasonable assurance of obtaining the necessary funds to finance construction costs until a minimum value of service agreements is committed and supporting documentation, including service agreements, are provided.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 251-52 (1998) (citations omitted).

II. THE BOARD SHOULD DENY THE STATE'S MOTION

The Board should deny the State's motion because the State seeks to compel PFS to respond to discovery requests that pertain to issues that have been rendered moot by PFS's financial commitments. In the alternative, if the Board were to first grant PFS's motion for partial summary disposition of Utah E, then the State's motion should be de-

nied as moot, in that the contention bases to which the discovery in question pertains will no longer be part of this proceeding.

A. The State Seeks Material Pertaining to Issues within Utah E That Were Rendered Moot by PFS's Financial Commitments

The Commission's discovery regulations allow that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding . . . ." 10 C.F.R. § 2.740(a)(1). The State's requests all pertain to the market or need for spent fuel storage and PFS's efforts to obtain customer Service Agreements. See State Req. at 12-13, 15-18. However, PFS's financial commitments as the means of demonstrating its financial qualifications render moot the issue of the market or need for spent fuel storage. Thus, the State's discovery requests seek material not reasonably calculated to lead to evidence relevant to PFS's financial qualifications. Hence, its motion to compel should be denied.

1. The State's Requests Pertaining to the Issues of the Market or Need for Spent Fuel Storage Seek Material Not Discoverable

The State asserts that all of its requests that are the subject of its motion are relevant to Utah E Basis 7, "which, in part, asserts that the Applicant must document an existing market for the storage of spent fuel as well as the commitment of a sufficient number of Service Agreements to fund the PFS project." State Mot. at 8; see id. at 9 ("the relevance of the State's document requests are the same as the relevance of the admission requests").

The State's requests are irrelevant to the financial qualifications of PFS, in that PFS's financial commitments render the issue moot. See PFS Utah E Mot. at 5-10.

PFS's commitments not to build the PFSF without committed funding sufficient to cover construction costs and not to operate the PFSF without customer Service Agreements in place sufficient to cover operating and maintenance costs obviate the need for PFS to demonstrate a market for spent fuel storage services. Id. at 3-10. By virtue of these formal commitments, PFS does not need to demonstrate, as claimed by the State, "a likelihood that PFS will be able to finance the entire project prior to license issuance." State Req. at 8 (emphasis added). Specifically, as the Commission stated in the LES case,

> [I]f [the intervenor] is correct and the project proves a failure in the marketplace, the lack of economic success will have no adverse effect on the public health and safety or the common defense and security. Under the commitments LES has made to the Commission, if the market does not allow LES to raise sufficient capital for construction or to obtain the promised advance purchase contracts, LES will not build or operate the CEC.

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 308 (1997) (emphasis added).

Similarly here, if the market does not allow PFS to raise sufficient capital for construction or to obtain the promised advance purchase contracts, PFS will not build or operate the PFSF. As observed by the Commission in LES, if the PFSF "never begins operation, there is no risk whatever to public health and safety." Id. at 307. Therefore, the "likelihood" that PFS will meet its commitments, see State Mot. at 8, is simply irrelevant – either PFS will meet its commitments and construction and operation will proceed, or PFS will not meet its commitments, and construction and operation will not proceed. Furthermore, as the Commission ruled in LES, PFS does not need to document its Service Agreements at the time of licensing – the financial commitments provide reasonable

assurance of the ability to obtain funding for the project. PFS Utah E Mot. at 12-13 (citing LES, CLI-97-15, 46 NRC at 305). Therefore, the State's discovery requests pertain to issues rendered moot by PFS's financial commitments. See PFS Mot. at 9-10. Thus, the State seeks material not discoverable and its motion should be denied.

2. **The State's Requests Pertaining to the Issue of the Adequacy of PFS's Financial Base Seek Material Not Discoverable**

The State also claims that its requests are "relevant to Basis 2, wherein the State claims PFS has failed to show that it has a sufficient financial base to assume all the obligations it may incur." State Mot. at 8; see id. at 9 (document requests).

The State's claim is wrong. As PFS has shown in its motion for summary disposition, PFS's financial commitments – set forth above – provide reasonable assurance that PFS's financial base will be adequate before PFS constructs or operates the PFSF. PFS Utah E Mot. at 11-12. In LES, the applicant, at the time of licensing, had no assets and its members were not obligated to advance equity contributions for the facility; the Commission nevertheless found LES financially qualified on the basis of its commitments, not the obligations of its members. CLI-97-15, 46 NRC at 305-06. Thus, because PFS has made similar commitments here, the PFS's financial base will be sufficient at the time of construction and operation without the need to demonstrate at hearing that there is a sufficient spent fuel storage market. Therefore, PFS's commitments render moot the allegations regarding PFS's financial base in Basis 2. Hence, the State seeks material not discoverable, in that it is not reasonably calculated to lead to evidence relevant to PFS's financial qualifications. Thus, the State's motion to compel should be denied.

3. The State's Requests Pertaining to the Issue of PFS's Ability to Obtain Debt Financing Seek Material Not Discoverable

The State also claims, regarding its discovery requests, that "Basis 8, which asserts that it is necessary for PFS to have a minimum value of committed service agreements before debt financing is a viable option, is also relevant." State Mot. at 8; see id. at 9 (document requests).

The State is wrong. Basis 8 asserts that debt financing is not viable for PFS until a minimum value of service agreements is committed and the agreements are produced. See Utah E, supra. However, PFS's commitment not to commence construction without sufficient committed funds to construct the PFSF renders moot the issue of PFS's ability to obtain debt financing. PFS Utah E Mot. at 16-17. PFS is not relying on the demonstration of the availability of debt financing to satisfy its financial assurance requirements. Id. at 16. Therefore, the State's discovery requests do not concern an issue relevant to PFS's financial qualifications, given its commitments, and the State's motion to compel should be denied.

4. The State's Requests Pertaining to the Issues of the Owners of PFS and Their Relationships with PFS Seek Material Not Discoverable

Finally, the State claims that its "Requests for Admission No. [5] and [6] (relating to NSP [PFS member Northern States Power]) may lead to admissible evidence as to the relationship among PFS consortium members under Basis 1." State Mot. at 8.[5]

[5] The State's motion as written on page 8 cites Request Nos. 4 and 5, but only Request Nos. 5 and 6 pertain to NSP [Northern States Power]. This is apparently a typographical error, in that on page 6 of its motion the State identifies Request Nos. 5 and 6 as pertaining to NSP. See also State Req. at 12.

Basis 1 provides no support for those requests. First, both requests ask about the effect of an agreement between NSP and Alliant on NSP's ability to store spent fuel at sites other than NSP reactors. State Req. at 12. Utah E Basis 1, however, asserts that the PFS application is deficient in that it does not discuss the relationships between PFS and its owners. See Utah E, supra.[6] Alliant is not an owner of PFS. The NSP/Alliant agreement has no bearing whatsoever on PFS. Second, the information on the owners of PFS and their relationships with PFS that PFS has provided the NRC Staff, the State and the Board renders Basis 1 moot. PFS Utah E Mot. at 10-11. Therefore, the State requests seek material not calculated to lead to evidence relevant to the financial qualifications of PFS and the State's motion should be denied.

B. In the Alternative Should the Board First Grant PFS's Motion for Partial Summary Disposition of Utah E, It Should Deny the State's Motion as Moot

In the alternative, should the Board rule in favor of PFS's Motion for Partial Summary Disposition prior to ruling on the State's motion to compel, the Board should deny the State's motion as moot. In its motion for summary disposition, PFS has asked the Board to dismiss Utah E Bases 1-5 and 7-10, see PFS Utah E Mot, which includes all the bases for which the State claims its discovery requests are relevant.[7] If a contention, or portion thereof, is dismissed, a party is no longer entitled to discovery pertaining

[6] Utah E Basis 1 cites 10 C.F.R. § 50.33(f), which requires reactor license applicants to discuss the relationship between the applicant and its owners – not between applicant's owners. 10. C.F.R. § 50.33(f)(3)(i). In any event this provision does not apply to Part 72 license applicants. PFS Utah E Mot. at 11 n.8; Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36 (1998).

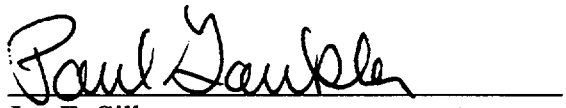
[7] The State asserts that its discovery requests at issue pertain to Bases 1, 2, 7, and 8.

thereto. Therefore, Board should deny the State's motion to the extent that it seeks material to a basis of Utah E that is dismissed.

III. CONCLUSION

For the reasons stated above, the Board should deny the State's motion to compel because PFS has made commitments regarding the financing of the PFSF that render moot the issues to which the State's discovery requests pertain. In the alternative, should the Board rule in favor of PFS's Motion for Partial Summary Disposition prior to ruling on the State's motion to compel, the Board should deny the State's motion on the grounds that it seeks material no longer relevant to the admitted bases of a contention.

Respectfully submitted,



Jay E. Silberg
Ernest L. Blake, Jr.
Paul A. Gaukler
SHAW PITTMAN,
2300 N Street, N.W.
Washington, DC 20037
(202) 663-8000
Counsel for Private Fuel Storage L.L.C.

Dated: December 21, 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 - ISFSI
	)	
(Private Fuel Storage Facility)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Opposition to State of Utah's Motion to Compel on the State's Fourth Set of Discovery Requests 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 21st day of December 1999.

G. Paul Bollwerk III, Esq., Chairman Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: GPB@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: JRK2@nrc.gov; kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: PSL@nrc.gov

* Susan F. Shankman
Deputy Director, Licensing & Inspection Directorate, Spent Fuel Project Office
Office of Nuclear Material Safety & Safeguards
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications Staff
e-mail: hearingdocket@nrc.gov
(Original and two copies)

* Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Catherine L. Marco, Esq.
Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: pfscase@nrc.gov

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancel@state.UT.US

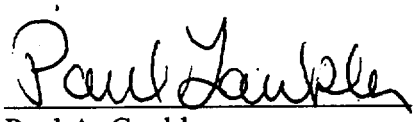
John Paul Kennedy, Sr., Esq.
Confederated Tribes of the Goshute Reservation and David Pete
1385 Yale Avenue
Salt Lake City, Utah 84105
e-mail: john@kennedys.org

Joro Walker, Esq.
Land and Water Fund of the Rockies
2056 East 3300 South, Suite 1
Salt Lake City, UT 84109
e-mail: joro61@inconnect.com

D. Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg, L.L.P.
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
e-mail: DCurran.HCSE@zzapp.org

Danny Quintana, Esq.
Skull Valley Band of Goshute Indians
Danny Quintana & Associates, P.C.
68 South Main Street, Suite 600
Salt Lake City, Utah 84101
e-mail: quintana@xmission.com

* By U.S. mail only



Paul A. Gaukler

Document #: 871498 v.1