

December 20, 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 MOTION FOR PROTECTIVE ORDER
REGARDING DISCOVERY FOR CONTENTION UTAH H**

Private Fuel Storage L.L.C. ("Applicant" or "PFS") moves for a protective order pursuant to 10 C.F.R. § 2.740(c) with respect to a request by the State of Utah ("State") for discovery on Contention Utah H ("Utah H"). The State seeks to force PFS to produce the input data for the "FLUENT" thermal-hydraulic computer code in a particular form that would impose a significant and undue burden and expense upon PFS. PFS moves for the protective order on the grounds that 1) PFS has already produced the data to the State in the form in which the data is maintained in the usual course of business, and 2) PFS does not have the data in the form sought by the State and creating it and producing it in such form would be unduly burdensome and unreasonably expensive. PFS therefore requests the Atomic Safety and Licensing Board ("Board") to enter a protective order relieving PFS from having to create and produce the data in the form sought by the State or, in the alternative, requiring the State to pay the full cost of any such production of the data.

I. BACKGROUND

Contention Utah H, as admitted by the Board, asserts, in part, that the thermal analysis for the HI-STORM 100 spent fuel storage casks to be used at the Private Fuel Storage Facility ("PFSF") was inadequate in that it failed to account for certain thermal effects identified in the contention.¹ On April 9, 1999, the State filed a discovery request asking PFS, inter alia, to produce the commercially available FLUENT computer code that had been used by PFS's contractor, Holtec International, to perform an expanded HI-STORM thermal ("EHT") thermal analysis which took into account the second-order thermal effects identified in Utah H.² See LBP-99-42, 50 NRC ___, slip op. at 11-12 (Nov. 2, 1999). PFS objected to the request on various grounds, id. at 13,³ and on April 30, 1999, the State filed a motion to compel PFS to produce, inter alia, the FLUENT code. Id. at 11-12. On May 19, 1999, PFS filed a motion for partial summary disposition of Utah H that could have rendered the motion to compel moot. Id. at 2. On November 2, 1999, the Board denied PFS's motion for summary disposition. It instructed that the parties reassess the discovery requests and determine what remained in dispute and, if unable to agree, that PFS should file a motion by November 19, 1999 for a protective order which would 1) identify the material still in dispute and 2) outline PFS's reasons for withholding that material. Id. at 18.

¹ See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 253 (1998).

² Disputes over other aspects of the State's discovery requests relating to Utah H have been resolved and thus they are not the subject of this motion. See infra.

³ See also Applicant's Response to State of Utah's Proprietary and Non-Proprietary Motions to Compel Applicant to Respond to State's First Set of Discovery Requests (May 7, 1999), at 8-10.

After the Board's ruling, PFS and the State successfully resolved all outstanding discovery requests on Utah H except production of the FLUENT code. The parties agreed to leave that issue open to allow the State an opportunity to review the documents being produced by PFS to determine whether it still desired to pursue its request for the code.⁴ Because of the software license key required to run the code, it is not possible for Holtec to copy the code and provide it to the State, which moreover is legally protected as the intellectual property of Fluent, Inc. Rampall Dec. at ¶ 4. Further, the FLUENT code is commercially available from Fluent, Inc. at a cost of approximately \$30,000. *Id.* at ¶ 6. The parties did agree that PFS would provide the State: 1) the relevant portions of the FLUENT User's Manual, which describes the relationships, equations, and data FLUENT uses to perform its thermal calculations and the results it produces; 2) the input data for FLUENT that Holtec used in its EHT model analysis; and 3) the output data produced by the FLUENT calculations performed by Holtec for the EHT model for the HI-STORM 100 at the PFSF.⁵ The input and output data were provided in both text and electronic form, as maintained in the usual course of business by Holtec.⁶

After reviewing the above material provided by PFS, the State asked PFS a series of questions in an attempt to determine whether it still desired to pursue its request for a

⁴ Joint Motion for Extension of Time to File Protective Order Regarding Discovery for Contention Utah H (November 19, 1999); Joint Motion for Extension of Time to File Protective Order Regarding Discovery for Contention Utah H (December 13, 1999).

⁵ Letter from W. Hollaway to D. Curran (November 30, 1999), attached as Exh. 1; Letter from D. Curran to W. Hollaway (December 9, 1999), attached as Exh. 6; Rampall Dec. at ¶ 7.

⁶ Letter from W. Hollaway to D. Curran (November 30, 1999), attached as Exh. 1; Rampall Dec. at ¶ 7. The electronic form of the data can only be read and used if one has a copy of the FLUENT code, which as noted above, however, is commercially available should the State decide to acquire it. *Id.* at ¶¶ 4, 7.

copy of the FLUENT code. PFS responded in an effort to resolve this issue without involving the Board.⁷ On December 16, 1999, the State finally concluded that it did not need the FLUENT code.⁸

In place of the code, however, the State now maintains that it must have additional information to understand the Holtec thermal analysis.⁹ Specifically, it seeks paper copies of up to 25 computer screen images, depicting so-called “decision boxes” or code input devices for each of the 19 “zones” Holtec used with the FLUENT code to model EHT analysis, or 475 images in all.¹⁰ All of the information represented by the “decision boxes” has, however, already been provided to the State by PFS and Holtec with the input data for FLUENT, as maintained by Holtec during the normal course of its business. Rampall Dec. at ¶ 7. PFS and Holtec do not have or maintain paper or electronic copies of the computer screen images depicting the panels of “decision boxes” as sought by the State. Id. at 9. Rather, the images would need to specially generated by manually ex-

⁷ Letter from W. Hollaway to D. Curran (December 3, 1999) (Exh. 2); Letter from W. Hollaway to D. Curran (December 7, 1999) (Exh. 4); Facsimile from W. Hollaway to D. Curran (December 9, 1999) (Exh. 5).

⁸ Letter from D. Curran to W. Hollaway (December 16, 1999), attached as Exh. 10.

⁹ Letter from D. Curran to W. Hollaway (December 16, 1999).

¹⁰ Letter from D. Curran to W. Hollaway (December 8, 1999); see also First letter from D. Curran to W. Hollaway (December 14, 1999), attached as Exh. 4; Second Letter from D. Curran to W. Hollaway (December 14, 1999), attached as Exh. 9; Rampall Dec. ¶ 9. In modeling the EHT analysis of the HI-STORM 100 at the PFSF with FLUENT, Holtec divided the spent fuel storage cask and the concrete storage pads into “zones” representing different regions within the casks and the pads. Rampall Dec. at ¶ 9. Each zone has its own dimensions, thermomechanical properties, and heat transfer boundary conditions. Id. What the State refers to as “decision boxes,” are alternative input devices that can be used with the FLUENT code to create the “case file” or input file for the code. Holtec did not use the particular input devices identified by the State when it created its input data for FLUENT. Nevertheless, all the information that would be conveyed by the computer screen images of the input devices sought by the State is contained in the “case files” or input files that Holtec (through PFS) has already provided to the State. Id. at ¶¶ 8-13.

tracting each image individually from FLUENT, at a cost of thousands of dollars. Rampall Dec. at ¶ 15. This represents an undue burden and expense that PFS should not be required to bear, particularly given that the information has been provided to the State in the form maintained by Holtec in its usual course of business.

II. A PROTECTIVE ORDER IS WARRANTED BECAUSE COMPLYING WITH THE STATE'S REQUEST WOULD IMPOSE AN UNDUE BURDEN

“Upon motion . . . and for good cause shown, the presiding officer may make any order which justice requires to protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense . . .” 10 C.F.R. § 2.740(c) (emphasis added). Appropriate remedies include: 1) that “discovery not be had;” 2) that “discovery . . . be had only on specified terms and conditions;” and 3) that discovery . . . be had only by a method of discovery other than that selected by the party seeking discovery.” 10 C.F.R. §§ 2.740(c)(1-3). Because 1) PFS has already produced to the State the information it seeks, and 2) PFS does not have the information in the form sought by the State, and creating the information in that form would be an undue burden and expense, PFS asks to be relieved from creating and producing the information in the form sought by the State or, in the alternative, that PFS be required to create and produce the information in the form sought by the State only if the State pays PFS the full cost of creating it.

A. PFS Has Already Produced the Information Sought by the State in the Form Maintained during the Usual Course of Business

While the State's request is phrased as a document production request, the State in fact seeks information in a form (the computer screen images) not maintained by PFS or Holtec. Rampall Dec. at 9. PFS has produced the information to the State in the form it

(Holtec) maintains (the FLUENT input files). See Fed. R. Civ. P. 34 (“A party who produces documents for inspection shall produce them as they are kept in the usual course of business”). A party is not required to generate new documents or information in response to a document production request,¹¹ which is what the State seeks here.

Even if the State’s requests were viewed as interrogatories,¹² PFS still would not be required to produce the computer screen images depicting the input devices (i.e., “decision boxes”) sought by the State because PFS has already produced the information that would be conveyed by those screen images to the State with the FLUENT input files that PFS produced to the State on November 30. “Where any . . . document or other tangible thing sought is reasonably available from another source, . . . a sufficient response to an interrogatory involving such materials would be the location, the title and a page reference to the relevant . . . document or tangible thing.” 10 C.F.R. § 2.740(b)(1).¹³ Furthermore, “interrogatories may not be addressed to, or construed to require . . . [p]erformance of additional research or analytical work beyond that which is needed to support [a] party’s position on any particular matter.” 10 C.F.R. § 2.740(b)(3). As stated by the Commission in amending its rules of practice:

¹¹ Soetaert v. Kansas City Coca Cola Bottling Co., 16 F.R.D. 1, 2-3 (W.D. Mo. 1954); Toorchen v. Olin Industries, Inc., 6 F.R.D. 20 (S.D. N.Y. 1946); SEC v. Canadian Javelin, Ltd., 64 F.R.D. 648, 651 (S.D. N.Y. 1974).

¹² If viewed as interrogatories, the request would greatly exceed the limit of 10 interrogatories per contention imposed by the Board.

¹³ In a similar vein, it is also accepted NRC practice for a party to respond to a request for publicly available documents by citing the location at which they are available. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-79-8, 10 NRC 141, 147-48 (1979) (codified as 10 C.F.R. § 2.740(b)(1), Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,181 (1989)).

So long as prior to the trial, parties have an opportunity to learn what another party has done or what information that party has to provide the basis for its position, the party seeking discovery will be able to show in the hearing what, in its view, the other party should have done or why its position is incorrect.¹⁴

In short, PFS should not be required to create and produce the information in the form sought by the State – at great burden and expense to itself – when PFS has already produced such information in the FLUENT case files (i.e., input files) provided to the State. The information the State seeks is already in its hands.¹⁵

In its letter to PFS counsel, the State agreed that “PFS has already provided all of the factual assumptions [that went into the Holtec EHT analysis], which are contained in the ‘case’ or ‘input’ files given to [the State] on November 30, 1999.” Letter from D. Curran to W. Hollaway (December 16, 1999) (Exh. 10). The State claims, however, that PFS has not provided the “conceptual assumptions”, i.e., “the selection of various equations and/or conceptual models that were used in the thermal analysis,” which the State claims are reflected in the “decision boxes” which it seeks. Id.

The State’s claims are wrong. The FLUENT case files that Holtec (through PFS) provided to the State reflect the conceptual assumptions and choices of relationships and equations that Holtec used to perform the thermal analysis for the HI-STORM 100 at the PFSF. Rampall Dec. at ¶¶ 8, 10-12. The case files, with the FLUENT User’s Manual,

¹⁴ 54 Fed. Reg. at 33,174.

¹⁵ As noted earlier, PFS has provided the input files in both text and electronic form. To the extent the State believes that it is necessary for it to view the information contained in the input files in the form of the various pull down decision boxes that it has requested PFS to generate, the State could always acquire the FLUENT code and use the electronic version of the input files to generate those pull down decision boxes. Rampall Dec. at ¶¶ 7, 16. The FLUENT Code is commercially available, id. at ¶ 4 and the necessary information for obtaining it can be readily obtained from the its web site www.fluent.com

are intelligible such that one can read them and determine which assumptions, conditions, equations, and data were used to perform the thermal analysis. Id. at 13. The “decision boxes,” the computer screen images of which the State seeks, are merely some of a series of alternative, redundant input devices a FLUENT user can employ to create the input data file (i.e., the case file) for the code. A given piece of information can be entered into the FLUENT input data file from a number of different places within the code structure. Id. at ¶¶ 8, 11. In fact, Holtec did not use the particular decision boxes requested by the State. Id. at ¶ 8. No matter what input devices the user employs, however, all the data used by FLUENT in its thermal calculations – including the choices of relationships and equations used by FLUENT – is reflected in the case file. Id. at ¶¶ 8, 10-13. That is the only file that FLUENT uses to perform its calculations. Id. at ¶¶ 10-12. Therefore, because PFS has produced these files to the State (both in electronic and text form), it should not be required to produce the information again in merely a third form, when as explained below, doing so would be so burdensome and expensive.¹⁶

B. Creating and Producing the Information Sought by the State in the Form it Requests Would Be Unduly Burdensome and Expensive

PFS asks that it be relieved from having to create and produce the information sought by the State in the form sought by the State, or, in the alternative, that the State be

¹⁶ Under the traditional American rule that parties are responsible for the costs of their own lawsuits, when the means of translating provided data into another form is otherwise available to the party requesting the data, the requesting party, rather than the responding party, is responsible for the cost of translation, even if the cost is significant. See In re Puerto Rico Electric Power Authority, 687 F.2d 501, 507-09 (1st Cir. 1982). This rule covers the cost of providing the computer code that was the source of the data as well as alternative forms of data produced by the code. Id. at 509 (quoting Rule 34 Advisory Committee Note 48 F.R.D. 487, 527 (1970)).

required to pay the full cost of creating and producing the information in such form, because doing so would be unduly burdensome and expensive to PFS. 10 C.F.R.

§ 2.740(c). PFS should not be required to undertake this burden when it has already produced the information the State requests in the form in which it is maintained by Holtec “in the usual course of business.” See supra. It would be unduly burdensome and expensive to respond to the State request because PFS and Holtec do not maintain the information in the form the State seeks and creating and producing it would require considerable effort from a PFS (i.e., Holtec) expert on the FLUENT code.

The State requests computer screen images of up to 25 panels of “decision boxes” for each of 19 zones or 475 images in all. Rampall Dec. at ¶ 9. PFS and Holtec do not, however, maintain electronic or paper copies of the computer screen images depicting the panels of “decision boxes” sought by the State. Id. Rather, they must be specially generated individually by following a laborious process by someone familiar with the code to manually extract them individually from the computer screen while the FLUENT code is operating and the FLUENT case files are loaded into the computer. Rampall Dec. at ¶ 14. The extraction process involves the following steps, such that the entire process would take approximately 10 minutes per image produced:

1. The user must step through the FLUENT command structure as described in the User’s Manual instructions to access the display panel with the requested decision boxes.
2. The user must start a separate screen capture program to scan the screen video display bitmap. This is necessary because it is not possible to print the screen directly while the FLUENT code is running.
3. The user must save the captured information—the screen video display bitmap—on the computer’s hard disk.

4. The user must use a separate video editing program to read the saved screen capture information.
5. If the "decision boxes" sought would be rendered illegible by the color graphical images produced by the FLUENT code, the user will have to edit the video bitmap and clip out the relevant display panel information so that it is not obscured.
6. The user must print the captured screen image of the display panel on a high resolution printer.
7. The user must proofread the print for visual clarity, etc.

Id. At 10 minutes per image, the production of 475 images would take up to 80 man-hours, which, because it would have to be done by an expert familiar with the FLUENT code, would cost up to \$15,000. Id. at ¶ 15. The Holtec validation and quality assurance processes through which the documents would have to go could cost up to an additional \$30,000. Id. These costs would constitute an undue burden and expense for PFS.

III. CONCLUSION

For the foregoing reasons, PFS requests to be relieved from having to produce data previously provided by the State in the different form sought by the State, or, in the alternative, that the State be required to pay the full costs of PFS having to create and produce the data in the form sought by the State.

Respectfully submitted,



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Dated: December 20, 1999

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Motion for Protective Order Regarding Discovery for Contention Utah H, and the affidavit of Indresh Rampall, 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 20th day of December 1999 and that the exhibits to the Motion have been served by facsimile with conforming copies sent by first class U.S. mail.¹

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¹ The exhibits have not been sent by facsimile to counsel for OGD and the Skull Valley Band pursuant to previous requests not to have materials sent to them by facsimile.

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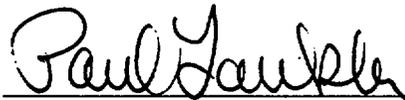
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