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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF GENERAL COUNSEL
REGULATORY AND
ADJUDICATION STAFF

Before the Atomic Safety and Licensing Board

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|---------------------------------|---|---------------------------|
| 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 RESPONSE TO STATE OF UTAH'S REQUEST FOR CHANGE
IN SCHEDULE WITH RESPECT TO CONTENTIONS UTAH K AND L**

Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby files its response to the "State of Utah's Request for a Change in the Schedule with respect to Contentions Utah K and L," August 24, 2000 ("State Request"). As set forth below, Applicant does not oppose the State's request for an extension of the schedule with respect to Utah K, in that the assumptions on which the current schedule was based have changed. Applicant does, however, oppose the State's request for an extension of the schedule for the litigation of Utah L, in that the assumptions underlying the current Utah L schedule have not changed. The State has provided no good reason to extend the Utah L schedule and no change in the schedule is warranted.

The current schedule for Utah K and L was arrived at by consensus of the parties, after extensive discussions and negotiations among the State, the NRC Staff and PFS.¹ The schedule provides for the completion of remaining discovery, summary disposition,

¹ The Licensing Board adopted the schedule in its Order (General Schedule Revision and Other Matters) of February 2, 2000.

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and filing of direct testimony between now and January 15, 2001, at which time the limited two month discovery window for the environmental contentions would commence.² The schedule allows the parties to focus on and complete the bulk of the litigation and pre-filed testimony for Utah K and L (the two remaining safety contentions originally scheduled for hearing this summer) prior to litigating the environmental contentions.

The current schedule for Utah K and L provided for the NRC Staff to take a position on Utah K and L by April 28, 2000. As scheduled, on April 28, 2000, the Staff did take a position on Utah L.³ The Staff has not yet, however, taken a position on Utah K, although it expects to finalize and issue its position on Utah K when it issues the final Safety Evaluation Report ("SER"), scheduled for September 30, 2000.

Because the underlying premise for the current schedule for Utah K has changed, PFS does not oppose the State's request for extending the schedule with respect to Utah K. Although less time than that provided for by the State's proposed schedule might be needed to complete the various tasks, it does not appear possible to complete the pre-filed testimony by January 15, 2000, as provided for under the current schedule, prior to the commencement of the litigation of the environmental contentions at that time.⁴

² The NRC Staff has set forth the current schedule for Utah K and L in its response to the State's request filed earlier today. "NRC Staff's Response to State of Utah's Request for a Change in the Schedule with respect to Contentions Utah K and L" at 1 August 29, 2000 ("Staff Response"). The page citations to both the State's Request and the Staff's Response are to computer generated printouts of the respective filings.

³ "NRC Staff Position Concerning Utah Contention L (Geotechnical)", Attachment to "NRC's Staff's Notice Concerning Utah K and Statement of Position Concerning Contention Utah L," April 28, 2000 ("NRC Staff Position on Utah L").

⁴ The State in its request correctly sets forth PFS's request to have the opportunity to file summary disposition on all outstanding issues in Utah K, including multiple launch rockets fired on Dugway Proving Ground and cruise missiles. Any renewed motion by PFS with respect to those two issues would be based

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With respect to Utah L, however, nothing has changed. The Staff issued its position on Utah L on April 28, 2000, the exact date provided for by the schedule agreed upon by the parties and adopted by the Board. Thus, no change to the schedule for Utah L is necessitated by any changes in circumstances, such as those with respect to Utah K.

The State advances several reasons to argue that a change in the Utah L schedule is appropriate,⁵ but none of them warrant a change in the schedule. The State first argues that the schedule for Utah L should be changed because the Staff has not yet acted on PFS's seismic exemption request to use a probabilistic hazard methodology.⁶ However, the issues raised in Utah L are separate and distinct from the PFS exemption request. As observed by the Staff, Contention Utah L essentially asserts that PFS "has inadequately characterized [the seismic and geotechnical conditions] at its proposed site."⁷ It challenges the adequacy of PFS's "site and subsurface investigations necessary to determine geologic conditions, potential seismicity, ground motion, soil suitability and foundation loading."⁸ The fact that the issues raised in Utah L are separate and distinct from the PFS

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on new information obtained since PFS's initial motion for summary disposition on Utah K (filed June 7, 1999) and should either resolve, or facilitate, the resolution of those issues.

⁵ Except for its request to defer Dr. Arabasz's deposition (which PFS opposes), the State would retain the current discovery schedule for Utah L (which provides for depositions of PFS and State witnesses from August 15 to September 30, 2000 and discovery against the Staff from September 15 to October 30, 2000). The State would, however, defer the summary disposition schedule and filing of pre-filed testimony to track the schedule proposed for Utah K, i.e., summary disposition deadline of December 29, 2000, responses by January 30, 2001 and Board decision by March 1, 2001 and pre-filed testimony due June 11, 2001. State Request at 4-5.

⁶ State Request at 3-4.

⁷ Staff Response at 3.

⁸ Private Fuel Storage (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 253 (1998).

exemption request is reflected by the fact that Staff was able to take a position on Utah L without acting on the exemption request.⁹

Similarly, the State's request to defer the deposition of Dr. Arabasz is without merit in that the issues raised by Utah L are separate from the PFS seismic exemption. To the extent that Dr. Arabasz would also be a witness with respect to a prospective State contention concerning any exemption that the Staff may grant would simply mean that he would be subject to deposition on those issues at the appropriate time in addition to being deposed on Utah L issues. Such does not provide a basis to defer his deposition on the separate issues in Utah L.

The State also argues that there is no logical reason to file the pre-filed written testimony for Utah L by the current schedule date of January 15, 2001, six months prior to the hearing. However, the parties had unanimously agreed to such a schedule seven months ago in order to complete the bulk of the litigation on Utah L prior to commencement of litigation on the environmental contentions. Nor does the filing of pre-filed testimony more than six months before the hearing defeat "the whole efficiency of pre-filed testimony," as the State now argues. The State claims that "[i]t is obvious that the parties either will have to amend pre-filed testimony immediately prior to the hearing or take time during the hearing during direct testimony to correct written testimony," However, the State provides no basis whatsoever for this claim and it is not apparent why amend-

⁹ See NRC Staff Position on Utah L at 1, n. 1 (PFS's request for an exemption "is outside the scope of Contention Utah L"). As reflected in the Staff's Position on Utah L, the issues raised in Utah L concern (apart from soil investigation issues that are unrelated, at least directly, to seismic considerations) the appropriate investigation and characterization of site characteristics to which one would then apply deterministic or probabilistic methodologies to arrive at the appropriate design basis earthquake.

ments and changes to the pre-filed testimony would turn on when the pre-filed testimony was filed.¹⁰ Moreover, delaying of the pre-filed testimony long after the depositions currently scheduled for September and October would likely make the depositions less effective in focusing and defining the differences between the parties on the issues raised in Utah L.

Thus, Applicant PFS opposes the State's request to change the schedule agreed upon earlier this year by the parties for the litigation of Contention Utah L.¹¹

Respectfully submitted,



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Dated: August 29, 2000

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¹⁰ The pre-filed written testimony could lead to the preparation of rebuttal testimony by the parties, but this would be true regardless of when the testimony was filed.

¹¹ While Applicant opposes any change to the schedule for Utah L, should the Board grant the State's request and defer summary disposition and the filing of pre-filed testimony for Utah L, the premise for completing the depositions by the end of September (allowing summary disposition decision and filing of pre-filed testimony by January 15, 2001) would no longer exist. Therefore, if the Board grants the State's request for changing the schedule for Utah L, it should also change the deposition schedule for Utah L to track that for Utah K, to allow the depositions to be at least somewhat closer in time to the pre-filed written testimony. This is particularly true if the Board were to also defer the deposition of Dr. Arabasz, for it would be unfair to require PFS to proceed with the depositions of its witnesses without being allowed to depose Dr. Arabasz.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Response to State of Utah's Request for Change in Schedule with Respect to Contentions Utah K and L" was served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 29th day of August 2000.

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