

September 27, 2000

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

**RAS 2237**

**DOCKETED 9/28/00**

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE, L.L.C	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent	)	
Fuel Storage Installation)	)	

NRC STAFF'S MOTION FOR PROTECTIVE ORDER, AND RESPONSE  
TO "STATE OF UTAH'S MOTION TO COMPEL NRC STAFF TO RESPOND  
TO STATE'S SEVENTH SET OF DISCOVERY REQUESTS (CONTENTION Z)"

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's September 21, 2000, "Order (Schedule For Responses to Motion to Compel)" and 10 C.F.R. §§ 2.730(c) and 2.740(c), the Nuclear Regulatory Commission staff ("Staff") hereby requests (a) that the Atomic Safety and Licensing Board ("Board") issue a Protective Order, to protect the Staff from the "annoyance, . . . oppression, or undue burden or expense" which would result if the Staff were required to provide further answers to the "State of Utah's Seventh Set of Discovery Requests Directed to the NRC Staff" ("Seventh Request"), dated August 31, 2000, and (b) that the Licensing Board deny the State of Utah's pending motion to compel further responses to those discovery requests, which the State filed on September 20, 2000.<sup>1</sup>

In support of this request, the Staff submits that it has properly responded in part and objected in part to the State's seventh set of discovery requests that pertain to Contention Utah Z, as set forth in the "NRC Staff's Objections and Responses to the 'State of Utah's Seventh Set of Discovery Requests Directed to the NRC Staff,'" dated

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<sup>1</sup> See "State of Utah's Motion to Compel NRC Staff to Respond to State's Seventh Set of Discovery Requests (Contention Z)," dated September 20, 2000 ("Motion to Compel").

September 13, 2000 (“Staff’s Objections and Responses”). Accordingly, for the reasons more fully set forth below, the Staff respectfully submits that it is entitled to a protective order, and that the State’s Motion to Compel should be denied.

#### BACKGROUND

On June 25, 1997, Private Fuel Storage, L.L.C. (“PFS” or “Applicant”) filed an application for a license to possess and store spent nuclear fuel (“SNF”) in an Independent Spent Fuel Storage Installation (“ISFSI”) to be constructed and operated on the Skull Valley Goshute Indian Reservation in Skull Valley, Utah. On July 31, 1997, the Commission published in the *Federal Register* a Notice of Consideration and Notice of Opportunity for Hearing on the application. See 65 Fed. Reg. 41,099. Various petitioners filed numerous contentions. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 156-63 (1998). The State, in particular, filed approximately 40 contentions, including Utah X (“Need for the Facility”), Utah Z, and Utah CC (“One-Sided Cost-Benefit Analysis”).<sup>2</sup>

As proposed, Contention Utah X stated that “[t]he Applicant fails to demonstrate there is a need for the facility as is required under NEPA.” Utah Contentions at 165. Proposed Contention Utah CC stated that “[c]ontrary to the requirements of 10 C.F.R. § 51.45(c), the Applicant fails to provide an adequate balancing of the costs and benefits of the proposed project, or to quantify factors that are amenable to quantification.” *Id.* at 178. Finally, proposed Contention Utah Z stated that “[t]he Environmental Report does not comply with NEPA because it does not adequately discuss the “no action” alternative.” *Id.* at 169.

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<sup>2</sup> See “State of Utah’s Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility,” dated November 23, 1997 (“Utah Contentions”).

As bases for Contention Utah X, the State asserted that there was “no substantiation” of the Applicant’s recitation that reactor sites are physically or economically unable to meet their anticipated fuel storage requirements (*id.* at 165); that “economic advantage” was the “driving need” for the PFS facility (*id.*); and that the Applicant “fails to give any basis” for its “speculation” that utilities may not be able to obtain state approval for onsite storage, which could result in premature plant shutdown (*id.* at 166). The Board, however, rejected this contention, in that “its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission’s regulations or rulemaking associated generic determinations; and/or lack adequate factual and expert opinion support.” *Private Fuel Storage*, LBP-98-7, 47 NRC at 202.

With respect to Contention Utah CC, as relevant here, the State asserted that “the Applicant fails to compare the environmental costs of the proposal with the significantly lower environmental costs of the no-action alternative.” Utah Contentions at 178. The Board rejected this contention in that “its supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application.” *Private Fuel Storage*, LBP-98-7, 47 NRC at 204.

While the Board admitted Contention Utah Z, regarding the no-action alternative (*see id.* at 203), the State did not assert any bases for that contention relating to economic costs. Rather, the State referred to “environmental consequences,” such as transporting 4,000 casks of spent nuclear fuel across the country, the potential for sabotage at the facility,<sup>3</sup> the risk of accidents from additional cask handling, and the “safety advantages” of storing spent nuclear fuel near the reactors. Utah Contentions at 169, 170.

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<sup>3</sup> On reconsideration, the Board denied this aspect of Contention Utah Z. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 296 (1998).

In June 2000, the Staff issued its Draft Environmental Impact Statement (“DEIS”) for the PFS ISFSI and a related transportation facility.<sup>4</sup> The State then filed the “State of Utah’s Seventh Set of Discovery Requests Directed to the NRC Staff,” dated August 31, 2000, purportedly seeking discovery on the DEIS’ treatment of the no-action alternative, which is the subject of Contention Utah Z. On September 13, 2000, the Staff filed its “Objections and Responses” to the State’s Seventh Set of Discovery Requests, in which it objected that many of the State’s discovery requests relate to matters outside the scope of Contention Utah Z, as filed and admitted by the Licensing Board.

Upon receiving the Staff’s Objections and Responses to the State’s Seventh Request, the State submitted its Motion to Compel. As more fully set forth below, the State seeks to compel the staff to respond to discovery requests that relate to rejected Contentions Utah X and Utah CC, pertaining to matters that were never asserted with respect to admitted Contention Utah Z. Therefore, the Staff’s motion for a protective order should be granted, and the State’s Motion to Compel should be denied.

## DISCUSSION

### A. Requests for Admissions

The State seeks to compel a response to Request for Admission No. 1, which states as follows:

REQUEST FOR ADMISSION NO. 1 - UTAH Z. Do you admit that calculations supporting *Utility At-Reactor Spent Fuel Storage Costs For the Private Fuel Storage Facility Cost-Benefit Analysis* Revision 2, ERI 2025-0001, April 2000, are treated by the NRC as proprietary. See DEIS at Section 8.1.1 PFS’s Model and Assumptions; and letter from John L.

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<sup>4</sup> NUREG-1714, “Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah” (“DEIS”) (June 2000).

Donnell to NRC dated April 14, 2000 (re: submittal of Revised Cost Benefit Analysis).

See Motion to Compel at 5.

The State asserts that this request relates to the document the Staff references to support at-reactor “spent fuel storage costs.” *Id.* The Request, however, solely asks the Staff to admit that certain calculations are treated by the NRC as proprietary.

As the Staff stated in its objection to this request, the classification of the information as proprietary has no relevance to the adequacy of the DEIS analysis of the “no action” alternative, nor is it relevant to the merits of the contention. See Staff’s Objections and Responses at 8. The State has not asserted in its Motion to Compel any reason why the mere designation of a document as proprietary or non-proprietary is relevant or is reasonably calculated to lead to the discovery of admissible evidence. See Motion to Compel at 5. Moreover, in light of the fact that the State has access to proprietary information, the State is not at any disadvantage with respect to the availability of the information and is capable of ascertaining the proprietary nature of that information on its own. Accordingly, the State’s Motion to Compel with respect to Request for Admission No. 1 should be denied.

Next, the State seeks a response to its Request for Admission No. 7, which states:

REQUEST FOR ADMISSION NO. 7 - UTAH Z. Do you admit that regardless of the PFS proposal, fuel will continue to accumulate in existing at-reactor storage facilities? See DEIS at xli.

The Staff, in its objection to this request, stated that it is vague and ambiguous because the State does not identify the at-reactor storage facilities to which it applies. Staff’s Objections and Responses at 12.

The State asserts that this request relates to the “accumulation of fuel in at-reactor facilities.” Motion to Compel at 5. Further, the State complains that the Staff’s objection

is “disingenuous” because the term “at-reactor facilities” comes from the DEIS page referenced in the request. *Id.* This argument, however, ignores the Staff’s objection: Whether or not fuel would continue to accumulate at a reactor is a reactor-specific question, which cannot be answered in response to a compound request for admission that lumps all reactors together. Thus, whether fuel would “continue” to accumulate at a specific reactor would depend on whether the reactor continues to operate, whether (and for how long) it will have sufficient space in which to store additional spent fuel; also, as indicated in the DEIS discussion cited by the State, spent fuel would continue to be stored at reactor sites until it is shipped to the DOE permanent geological repository. *Id.* Nowhere in its Motion to Compel does the State address the Staff’s objection that the request is confusing due to its open-ended nature with respect to the identity of specific reactors or the length of time in question. Nor does the State show that the information could not reasonably be obtained from other publicly available sources. See Staff’s Objections and Responses at 12; 10 C.F.R. § 2.744. Accordingly, the State’s Motion to Compel with respect to Request for Admission No. 7 should be denied.

B. Requests for Document Production

The State propounded Document Requests Nos. 5 through 7, 13, and 15 as follows:

DOCUMENT REQUEST NO. 5 - UTAH Z. Please provide all documents that describe or otherwise address the cost of storing SNF at nuclear reactor sites.

DOCUMENT REQUEST NO. 6 - UTAH Z. Please provide all documents that describe or otherwise address the cost of storing SNF at an on-site ISFSI.

DOCUMENT REQUEST NO. 7 - UTAH Z. Please provide all documents that describe or otherwise address the cost of licensing an on-site ISFSI.

DOCUMENT REQUEST NO. 13 - UTAH Z. Please provide all documents that relate in any way to quantifying the savings to utilities from shipping fuel off site to PFS so that

the permanently shut down reactors may decommission the reactor site sooner. See DEIS at 1-6.

DOCUMENT REQUEST NO. 15 - UTAH Z. Please provide all documents that relate in any way to identifying specific utilities for which PFS would provide an economic alternative to at-reactor storage. See DEIS at 1-6.

Seventh Set of Discovery Requests; emphasis added.

As is clear from a reading of the language of these discovery requests, these requests pertain to the economic costs of storing SNF at nuclear reactor sites, storing SNF at an on-site ISFSI, and licensing an on-site ISFSI (Document Requests 5-7); and the economic cost savings to utilities from earlier decommissioning, and the specific utilities for which PFS would provide an economic advantage to at-reactor storage (Document Requests 13 and 15).

The State asserts that the object of these requests is to discover “what the Staff considers to be the baseline for the no-action alternative.” Motion to Compel at 6. The State also asserts that the documents are necessary to ascertain “the Staff’s basis for comparison of the no action alternative to other alternatives.” *Id.* Notwithstanding these assertions, however, it is clear that the State’s requests are outside of the scope of Utah Contention Z -- which only raised concerns regarding the environmental consequences of the no-action alternative. Therefore, these discovery requests are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

Further, as discussed above, Utah Contention Z is limited to the “no action” alternative. While the State asserts that the information is needed to show a baseline in order to compare the proposed action to other alternatives, that comparison is not related to Contention Utah Z, which addresses the adequacy of the “no action” alternative itself. Moreover, Contention Utah Z does not pertain to the comparison of the costs and benefits of the “no action” alternative to those of other alternatives, which was squarely proposed

for litigation, and rejected, with respect of Contention Utah CC.<sup>5</sup> See *Private Fuel Storage*, LBP-98-7, 47 NRC at 204.

If the Licensing Board's decision in LBP-98-7, rejecting Contention Utah CC ("One-Sided Cost-Benefit Analysis"), means anything, it means that Contention Utah CC has been resolved, and the issues raised in that contention cannot be re-introduced into the proceeding by posing discovery requests concerning such matters with regard to another contention, Utah Z ("No Action Alternative"), which never mentioned those issues. A review of Contention Utah Z and the basis statements provided in support thereof, as well as the Licensing Board's decision admitting the contention, clearly demonstrates that the State did not raise issues relating to economic costs in this contention. Inasmuch as the scope of a contention is limited to its basis, these matters are outside the scope of the contention, and discovery requests concerning such matters are not relevant to Contention Utah Z. See *Illinois Power Co.* (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1737 (1981) (the scope of the matters in controversy are limited to the specific alleged bases set forth in the contention). Accordingly, the State's Motion to Compel with respect to Document Requests No. 5-7, 13 and 15 should be denied.

Finally, the State seeks to compel discovery responses by the Staff to Document Requests No. 10, 11, 14, and 16. Those document requests stated as follows:

DOCUMENT REQUEST NO. 10 - UTAH Z. Please provide all documents that relate in any way to quantifying air pollutants that may be released from the increased use of fossil fuel fired power plants if the proposed PFS facility is not licensed. DEIS at xlii, lines 44-46.

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<sup>5</sup> Moreover, the State's quoted sentence in the basis of its contention pertains to the importance of having a proper "no action" alternative discussion (*i.e.* why the contention is material), rather than asserting that the Applicant's discussion is deficient. See 10 C.F.R. § (d)(2)(ii).

DOCUMENT REQUEST NO. 11 - UTAH Z. Please provide all documents that relate in any way to identifying the permanently shut down reactors which could be decommissioned sooner if the PFS facility is licensed? See DEIS at 1-6, line 17.

DOCUMENT REQUEST NO. 14 - UTAH Z. Please provide all documents that relate in any way to the earlier use of land for other activities because permanently shut down reactors may decommission the reactor site sooner. See DEIS at 1-6.

DOCUMENT REQUEST NO. 16 - UTAH Z. Please provide all documents that relate in any way to identifying all reactor sites that have physical limitations that would prevent building or expanding an at-reactor ISFSI. See DEIS at 1-11.

The State asserts that these discovery requests are proper, in that Contention Utah Z challenges the Applicant's failure to "provide a balanced comparison of environmental consequences among alternatives." See Motion to Compel at 7.<sup>6</sup> The State argues that the information sought "fits into this balance." *Id.*

The State's argument as to the need for this discovery demonstrates why the discovery requests are improper: These discovery requests may pertain to the cost-benefit analysis, but do not pertain to Contention Utah Z which only challenged the adequacy of the Applicant's no-action alternative analysis. A challenge to the Applicant's comparison of the environmental consequences among alternatives was squarely proposed in Contention Utah CC, which was rejected by the Board. *Private Fuel Storage*, LBP-98-7, 47 NRC at 204. Similarly, matters raised by the State regarding the need for the PFS facility, were the subject of Contention Utah X, which the Licensing Board also rejected.

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<sup>6</sup> The full wording of the State's basis statement provides, "[b]y not properly considering the no build alternative, the Applicant fails to provide the balanced comparison of environmental consequences among alternatives." See Utah Contentions at 169 (emphasis added).

*Id.* at 202. Accordingly, the State's Motion to Compel with respect to Document Requests No. 10, 11, 14, and 15 should be denied.

CONCLUSION

For the reasons set forth above, the Staff's Motion for a protective order should be granted, and the State's Motion to Compel should be denied.

Respectfully submitted,

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Dated at Rockville, Maryland  
this 27<sup>th</sup> day of September 2000

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
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PRIVATE FUEL STORAGE L.L.C. ) Docket No. 72-22-ISFSI  
 )  
(Independent Spent )  
Fuel Storage Installation) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION FOR PROTECTIVE ORDER, AND RESPONSE TO "STATE OF UTAH'S MOTION TO COMPEL NRC STAFF TO RESPOND TO STATE'S SEVENTH SET OF DISCOVERY REQUESTS (CONTENTION Z)" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 27<sup>th</sup> day of September, 2000:

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