

RAS 2273

DUPLICATE  
USPS

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'00 OCT 11 12:09

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Office of  
Administrative  
Services

In the Matter of:	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC	)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel	)	October 3, 2000
Storage Installation)	)	

**STATE OF UTAH'S MOTION TO COMPEL NRC STAFF TO RESPOND TO STATE'S EIGHTH SET OF DISCOVERY REQUESTS (CONTENTION Z)**

Pursuant to 10 C.F.R. §§ 2.740(f) 2.742, 2.744, and 2.790, the State of Utah hereby moves the Board to compel the Staff to answer certain requests for admission and produce or list certain requested documents with respect to the State of Utah's Eighth Set of Discovery Requests Directed to the NRC Staff, dated September 14, 2000, relating to Contention Utah Z.

**FACTUAL BACKGROUND**

The State's Eighth Set of Discovery Requests was prompted by the Staff's issuance of the DEIS,<sup>1</sup> and the discovery requests specifically reference representations made in the DEIS. On September 25, 2000, the Staff responded in "NRC Staff's Objections and Responses to the 'State of Utah's Eighth Set of Discovery Requests Directed to the NRC Staff.'" The Eighth Set of Discovery consisted of five requests for admission and 31 documents requests. The Staff's response consisted of objections to all Requests for

<sup>1</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*, June 2000.

Template = SECY-041

SECY-02

Admission (Requests Nos. 1-5) and 28 of the 31 Document Requests (Nos. 1-7, 8, 10, and 12-31). Similar to the Staff's response to the State's Seventh Set of Discovery Requests, the Staff's response to the Eighth Set contained numerous objections instead of a response, including that the information sought is presently available to the State, that requests are not within the scope of Contention Utah Z, that the requests fall within a contention rejected by the Board, and that the requests are vague and ambiguous.

On September 27, 2000, the State advised counsel for the Staff by letter of the State's concerns about the Staff's responses. Attorneys for the State and Staff could not resolve any of the disputed discovery responses.

#### ARGUMENT

**I. The Standard for Discovery Against the Staff for Requests for Admissions Is on the Same Footing as For Any Other Party and Is One of Broad Relevance.**

The State has authority to seek requests for admission under 10 CFR § 2.742. While the State understands that discovery against the Staff is often on a different footing than discovery against other parties, this is not the case with requests for admissions. Georgia Power Co. (Vogle Electric Generating Plant, Units 1 and 2), LBP-94-26, 40 NRC 93, 95-96 (1994). Neither 10 CFR § 2.742 nor any other NRC regulation provides for any different treatment of the Staff. *Cf.* 10 CFR § 2.742 and the special provisions for discovery against the Staff in 10 CFR §§ 2.720(h), 2.740(f)(3), 2.740a(j), 2.741(e), 2.744 and 2.790.

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." 10 C.F.R. § 2.740(b)(1). The Commission gives its discovery rules the same "broad and

liberal treatment” 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. 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 obtaining [admissible] evidence.” Safety Light Corp. (Bloomsburg Site Decontamination), LBP-92-3A, 35 NRC 110, 111-12 (1992); *see also*, 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.

Accordingly, the information sought by the State’s Request for Admission falls within the relevance standard for discovery.

## II. The State’s Document Requests Comply with Applicable NRC Regulations.

The Staff basically raised the same objections and arguments as it did to the State’s Seventh Set of Discovery to the Staff. The State refers the Board to the State’s Motion to Compel the Staff to Answer the State’s Seventh Set of Discovery (September 20, 2000) and incorporates those arguments into this motion. *See* State’s Motion to Compel at 3-4 (Part II). Moreover, the State served its Eighth Set of Discovery to the NRC Executive Director of Operations and complied with 10 CFR § 2.720(h) by stating “this discovery is necessary to a proper decision in this proceeding and ... [the] requested documents are not reasonably obtainable through any other sources.” Eighth Set at 1.

### III. The State's Requests Meets the Relevance Standard for Discovery

The State takes issue at the narrowness of the Staff's reading of the scope of Contention Z for purpose of discovery. The Staff has analyzed Contention Z as if it were being admitted for hearing rather than addressing discovery in terms of relevance. *See Commonwealth Edison Co* (Zion Station, Units 1 & 2), ALAB-185, 7 AEC 240 (1974) (The test as to whether particular matters are discoverable is one of "general relevancy." This test will be easily satisfied unless it is clear that the evidence sought can have no possible bearing on the issues). In its discovery requests, the State cited to portions of the DEIS which have a bearing on Contention Z, the no action alternative. Furthermore, the Board's decision not to admit certain Utah contentions does not in and of itself limit the scope of discovery on an admitted contention. The test is "relevance" and "possible bearing" on the issues of the admitted contention. In addition, merely because a request mentions the word "cost" does not mean that the issue should be relegated to Contention CC, One-Sided Cost Benefit Analysis, which was not admitted by the Board.

All of the State's Requests for Admission (Nos. 1-5) refer to quoted language from the DEIS relating to key cost assumptions in the PFS business plan. Document Requests Nos. 1-6 also bear on this issue. The No Action Alternative is the status quo alternative. If the Staff relies upon PFS's key cost assumptions to determine the suitability of the PFS site, then in order for the State to develop the no action alternative contention, it needs to understand the significance and consequences of the Staff's reliance on those PFS assumptions.

Document Requests Nos. 7, 8 and 10 relate to on-site or operating ISFSIs while

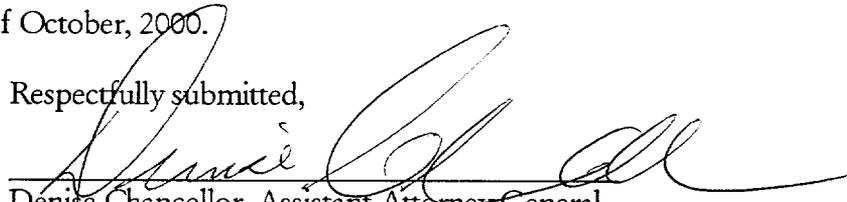
Document Requests Nos. 12-15 relate to the “small throughput” analysis in the DEIS, and the remaining Document Requests (Nos. 16-31) relate to the Staff’s reliance on the ERI analysis. All of these requests have a bearing on the State’s development of its no action alternative case. The State’s case is enhanced if the other scenarios supported by the Staff do not withstand scrutiny. The State may only analyze such an effect if it understands the rationale behind the Staff’s representations in the DEIS. Accordingly, the Staff should be ordered to respond to all the State’s disputed discovery requests.

### CONCLUSION

For the foregoing reasons, the Staff’s objections justifying its non-response to the State’s eighth set of discovery requests for Contention Z, as described above, are without merit. Therefore, the Staff should be ordered to answer the above described Requests.

DATED this 3<sup>rd</sup> day of October, 2000.

Respectfully submitted,



Denise Chancellor, Assistant Attorney General  
Fred G Nelson, Assistant Attorney General  
Connie Nakahara, Special Assistant Attorney General  
Diane Curran, Special Assistant Attorney General  
Laura Lockhart, Assistant Attorney General  
Attorneys for State of Utah  
Utah Attorney General's Office  
160 East 300 South, 5th Floor, P.O. Box 140873  
Salt Lake City, UT 84114-0873  
Telephone: (801) 366-0286, Fax: (801) 366-0292

'00 OCT 11 PM 12:09

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S MOTION TO COMPEL NRC STAFF TO RESPOND TO STATE'S EIGHTH SET OF DISCOVERY REQUESTS (CONTENTION Z) was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 3<sup>rd</sup> day of October, 2000:

Rulemaking & Adjudication Staff  
Secretary of the Commission  
U. S. Nuclear Regulatory Commission  
Washington D.C. 20555  
E-mail: hearingdocket@nrc.gov  
(original and two copies)

G. Paul Bollwerk, III, Chairman  
Administrative Judge  
Atomic Safety and Licensing Board  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555  
E-Mail: gpb@nrc.gov

Dr. Jerry R. Kline  
Administrative Judge  
Atomic Safety and Licensing Board  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555  
E-Mail: jrk2@nrc.gov  
E-Mail: kjerry@erols.com

Dr. Peter S. Lam  
Administrative Judge  
Atomic Safety and Licensing Board  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555  
E-Mail: psl@nrc.gov

Sherwin E. Turk, Esq.  
Catherine L. Marco, Esq.  
Office of the General Counsel  
Mail Stop - 0-15 B18  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555  
E-Mail: set@nrc.gov  
E-Mail: clm@nrc.gov  
E-Mail: pfscase@nrc.gov

Jay E. Silberg, Esq.  
Ernest L. Blake, Jr., Esq.  
Paul A. Gaukler, Esq.  
Shaw, Pittman, Potts & Trowbridge  
2300 N Street, N. W.  
Washington, DC 20037-8007  
E-Mail: Jay\_Silberg@shawpittman.com  
E-Mail: ernest\_blake@shawpittman.com  
E-Mail: paul\_gaukler@shawpittman.com

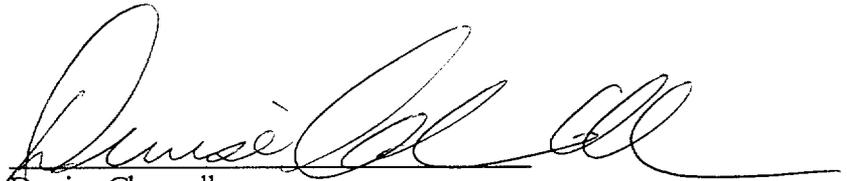
John Paul Kennedy, Sr., Esq.  
1385 Yale Avenue  
Salt Lake City, Utah 84105  
E-Mail: john@kennedys.org

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

Danny Quintana, Esq.  
Danny Quintana & Associates, P.C.  
68 South Main Street, Suite 600  
Salt Lake City, Utah 84101  
E-Mail: quintana@xmission.com

Office of the Commission Appellate  
Adjudication  
Mail Stop: 16-G-15 OWFN  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555  
(*United States mail only*)

James M. Cutchin  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
E-Mail: jmc3@nrc.gov  
(*electronic copy only*)

A handwritten signature in black ink, appearing to read "Denise Chancellor", written over a horizontal line.

Denise Chancellor  
Assistant Attorney General  
State of Utah