

**RAS 2365**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

**DOCKETED 11/09/00**

**SERVED 11/09/00**

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman  
Dr. Jerry R. Kline  
Dr. Peter S. Lam

In the Matter of

PRIVATE FUEL STORAGE, L.L.C.  
(Independent Spent Fuel Storage  
Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

November 9, 2000

MEMORANDUM AND ORDER  
(Ruling on Contention Utah Z  
Discovery Production Requests)

Pending before the Licensing Board are several requests by intervenor State of Utah (State) and the NRC staff for action on discovery matters relating to contention Utah Z, No Action Alternative, one of the admitted contentions in this proceeding that concern the environmental review of the proposed Skull Valley, Utah independent spent fuel storage installation (ISFSI) of applicant Private Fuel Storage, L.L.C. (PFS). These requests include (1) a September 20, 2000 State motion to compel responses from the staff regarding the State's seventh set of discovery requests concerning contention Utah Z; (2) a September 27, 2000 staff motion for protective order and response to the State's September 20 motion to compel; (3) an October 3, 2000 State motion to compel the staff to respond to an eighth set of contention Utah Z-related discovery requests; and (4) an October 11, 2000 staff motion for protective order and response to the State's October 3 motion to compel.

For the reasons set forth below, we grant in part and deny in part the State's September 20 and October 3, 2000 requests to compel and do the same relative to the respective staff September 27 and October 11, 2000 motions for protective order.

A. Admission Request Nos. 1 and 7 in State Seventh Set of Discovery Requests

DISCUSSION: [State] Motion to Compel NRC Staff to Respond to State's Seventh Set of Discovery Requests (Contention Z) (Sept. 20, 2000) at 5-6 [hereinafter First State Motion]; [Staff] 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)" (Sept. 27, 2000) at 4-6 [hereinafter First Staff Motion ].

RULING: At issue relative to this portion of the State's motion are requests to the staff for admissions, namely Nos. 1 and 7. Admission Request No. 1 asks the staff to declare whether a document the staff referenced in its June 2000 draft environmental impact statement (DEIS) in the context of a discussion of at-reactor spent fuel storage costs is proprietary in nature. The State asserts that this request satisfies all applicable NRC regulations relating to discovery. The staff declares that Admission No. 1 has no relevance to the adequacy of the DEIS analysis on the no-action alternative, nor is it relevant to the merits of the contention generally. Further, the staff asserts the State has access to any proprietary information that it may need to develop its case, making a response from the staff unnecessary.

Notwithstanding the staff's observation that the State has access to both proprietary and nonproprietary documents, we cannot say that having the staff declare its position regarding the nature of the document is outside the realm of discoverable matters in this proceeding given the disputes already before us regarding the proprietary nature of evidentiary material.

Accordingly, we grant the State's motion to compel and deny the staff's protective order request relating to this admission.

Admission Request No. 7 seeks a staff declaration regarding the continued accumulation of spent fuel pool waste at on-site reactor facilities, regardless of the creation of the PFS facility. The State declares a staff answer to this admission will further its understanding of the DEIS baseline calculations relative to the no-action alternative and enable it to assess the staff's no-action alternative against other alternatives. The staff, however, maintains that the admission request is vague and ambiguous because the State (1) does not identify the at-reactor storage facilities to which it applies; and (2) fails to identify the precise meaning of the word "continue," which is ambiguous because the amount of fuel that could accumulate at a reactor site would depend on whether the reactor continued to operate and whether, and for how long, the facility will have sufficient space to store spent fuel. As to the latter point, the State maintains that the staff's complaint about its failure specifically to identify the at-reactor storage facilities is "disingenuous" given that this is the exact terminology that appears in the staff's DEIS.

With respect to Admission Request No. 7, it would seem the request is, at best, a blunt instrument to obtain the information the State apparently seeks. On the other hand, as the State notes, the terminology "at-reactor storage facilities" was that used by the staff in its DEIS in stating that "[t]he two most likely no-action scenarios involve (1) the continued accumulation of [spent nuclear fuel (SNF)] in existing at-reactor storage facilities and (2) construction of new or expended at-reactor SNF storage facilities." DEIS at xli, lines 9-11. Recognizing that the staff has indicated its analysis is "limited to broad observations about the nuclear power industry," *id.* at lines 43-44, nonetheless, in making this no-action statement the staff must have been acting on some assumptions regarding utilization and storage capacity of existing at-reactor storage facilities that would permit it to respond to the State's admission request with whatever qualifications it finds appropriate. Accordingly, we grant the State's motion to compel and deny the staff's motion for protective order with respect to Admission Request No. 7.

B. State Document Request Nos. 5, 6, 7, 13, and 15 in State's Seventh Set of Discovery Requests

DISCUSSION: First State Motion at 6; First Staff Motion at 6-8.

RULING: This portion of the State's motion seeks to compel the staff to make available five types of documents. Document Request Nos. 5, 6, and 7 ask that the staff provide any documents that described or otherwise addressed the cost of storing SNF at reactor sites, the costs of storing SNF at an onsite ISFSI, and the cost of licensing an onsite ISFSI. Document Request Nos. 13 and 15 seek any documents that quantify the savings to utilities from shipping the SNF offsite for earlier decommissioning, and any documents that identify that storage at the PFS ISFSI would provide an economic alternative to at-reactor storage. The State asserts that these documents are necessary to develop its case for the evidentiary hearing in determining what the staff considers as its baseline for evaluation of the no-action alternative, and furthermore, to evaluate the no-action alternative against other alternatives. The staff objects based on the assertion that the State's requests are beyond the scope of contention Utah Z because that issue statement only raised concerns about environmental consequences of the no-action alternative. In addition, the staff declares that the need for documents to establish a baseline for comparison is irrelevant because contention Utah Z does not concern the comparison of the costs and benefits of the no-action alternative, a cost-benefit analysis matter that was already resolved by the Board when it rejected contention Utah CC, One-Sided Cost Benefit Analysis.

Bearing in mind that the scope of discovery is limited to the particular proceeding and the contentions that have been admitted, see Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 55 (1999), and our ruling on contention Utah CC, see LBP-98-7, 47 NRC 142, 204 (1998), we find the staff's argument that contention Utah Z-related discovery is limited only to environmental (as opposed to economic) impacts is meritorious.

Accordingly, we deny the State's request to compel the staff to respond to Document Request Nos. 5, 6, 7, 13, and 15, and grant the staff's motion for protective order with respect to those same requests.

C. State Document Requests Nos. 10, 11, 14, and 16 from State's Seventh Set of Discovery Requests

DISCUSSION: First State Motion at 6-7; First Staff Motion at 8-10.

RULING: Document Request No. 10 asks that the staff provide the State with all documents that quantify the air pollutants that may be released from increased use of fossil fuels if the PFS ISFSI is not licensed. Document Request Nos. 11 and 14 request any information that identifies reactors that could be permanently shut down earlier with licensing of the ISFSI, leading to earlier use of land for other activities. Document Request No. 16 requests all information that identifies any reactor sites that prevent building at-reactor ISFSI's due to physical limitations.

The State maintains that responses to these document requests will provide it with information needed to evaluate the no-action alternative in the DEIS. The State adds that the documents requested fit squarely within the scope of contention Utah Z because of PFS's failure to "provide a balanced comparison of environmental consequences among alternatives." First State Motion at 6 (quoting [State] Contentions on the Construction and Operating License Application by [PFS] for an [ISFSI] (Nov. 23, 1997) at 169). The staff argues that even though the requests relate to the environmental consequences analysis, they do not pertain to contention Utah Z as originally presented, going instead to the need for the facility and the adequacy of the PFS cost-benefit analysis that were dismissed by the Board in contention Utah X, Need for the Facility, and contention Utah CC.

We find these document requests could lead to the discovery of admissible evidence with regard to admitted contention Utah Z. Regardless of whether these requests would

produce information that would be relevant to other previously dismissed contentions, they have a legitimate nexus to contention Utah Z and the adequacy of the no-action alternative analysis for the PFS ISFSI. Therefore, we grant the State's motion to compel Document Request Nos. 10, 11, 14, and 16, and deny the staff's motion for protective order with respect to those same requests.

D. State Admission Request Nos. 1-5 from State's Eighth Set of Discovery Requests; State Document Request Nos. 1-8, 10, 12-31 from State's Eighth Set of Discovery Requests

DISCUSSION: [State] Motion to Compel NRC Staff to Respond to State's Eighth Set of Discovery Requests (Contention Z) at 2-5 (Oct. 3, 2000) [hereinafter Second State Motion]; [Staff] Response to "State of Utah's Motion to Compel NRC Staff to Respond to State's Eighth Set of Discovery Requests (Contention Z)," and Motion for Protective Order at 5-10 (Oct. 11, 2000) [hereinafter Second Staff Motion].

RULING: At issue in the State's second motion to compel are Admission Request Nos. 1-5 and Document Request Nos. 1-8, 10, and 12-31. Admission Request Nos. 1-5 ask for admissions regarding canister and overpack costs referenced in the DEIS. Document Request Nos. 1-6 also are related to the discussion of canister and overpack costs in the DEIS. See DEIS at 8-5. Document Request Nos. 7, 8, and 10 concern the costs and benefits of operating onsite ISFSIs. See DEIS at 1-7, 9-9. Document Request Nos. 12-15 involve the "throughput" scenarios analysis in the DEIS. See DEIS at 8-1, lines 39-42; see also id. at 8-2, lines 1-5. Finally, Document Request Nos. 16-31 involve the staff's reliance on the analysis included in the report Utility At-reactor Spent Fuel Storage Costs for the Private Fuel Storage Facility Cost-Benefit Analysis Revision 2, generated by PFS contractor Energy Resources International, see DEIS at 8-2, lines 13-19, and the Commission's reference to a second off-site ISFSI in its December 1999 waste confidence determination, 64 Fed. Reg. 68,005 (1999).

The State argues that the staff should be compelled to address these admission requests and document production requests because they are necessary to the State's evaluation of the adequacy of the DEIS no-action alternative analysis. The State argues that it can only analyze the data if it understands the rationale behind the staff's representations. The staff, on the other hand, contends that, like those items in the seventh set of discovery requests, the eighth request also goes beyond the scope of admitted contention Utah Z. More specifically, the staff asserts that with these discovery requests the State seeks information "on the economic costs of the facility and/or the 'no action' alternative—which the State had never identified in either the contention or its supporting basis statements." Second Staff Motion at 5-6. In addition, the staff asserts that this issue was already resolved by the dismissal of contentions Utah X and Utah CC.

Again, we agree with the staff that contention Utah Z as stated addresses environmental consequences. As a result, the cost matters that are the focus of these discovery requests are not relevant to the litigation of this contention.<sup>1</sup> We thus deny the State's motion to compel Admission Request Nos. 1-5 and Document Requests Nos. 1-8, 10,

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<sup>1</sup> Although certain aspects of some of these discovery requests might involve matters other than economic costs, the State has made no attempt to support its motion to compel on any other grounds.

and 12-31 and grant the staff's motion for protective order with respect to the aforementioned discovery requests.

Absent some other agreement between the parties, the staff shall provide the discovery responses required by this issuance on or before Monday, November 20, 2000.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>2</sup>

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G. Paul Bollwerk, III  
ADMINISTRATIVE JUDGE

Rockville, Maryland

November 9, 2000

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<sup>2</sup> Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PFS; (2) intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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Installation) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON CONTENTION UTAH Z DISCOVERY PRODUCTION REQUESTS) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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LB MEMORANDUM AND ORDER  
(RULING ON CONTENTION UTAH Z  
DISCOVERY PRODUCTION REQUESTS)

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[Original Signed by Kris Cater]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 9<sup>th</sup> day of November 2000