RAS 2906

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 RESPONSE TO STATE OF UTAH'S MOTION TO COMPEL APPLICANT TO RESPOND TO STATE'S TENTH SET OF DISCOVERY REQUESTS ON UTAH CONTENTION Z

Applicant Private Fuel Storage, L.L.C. ("Applicant" or "PFS") files the following response to "State of Utah's Motion to Compel Applicant to Respond to State's Tenth Set of Discovery Requests on Utah Z" ("Motion to Compel"). For the reasons set forth below, the State's Motion to Compel should be denied.

I. BACKGROUND

On April 22, 1998, the Atomic Safety and Licensing Board ("Licensing Board" or "Board") admitted Utah Z. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 203 (1998). Utah Z, as admitted, asserts that: "The Environmental Report does not comply with NEPA because it does not adequately discuss the 'no action' alternative." Id. at 256. The scope of the contention was limited by the bases which accompanied it. In the basis for Utah Z, the State asserted that the Applicant's Environmental Report ("ER") "focuses solely on the perceived disadvantages of the no build alternative." Utah Contentions[1] at 169 (emphasis in original). Specifically, the State claimed that "[t]he [ER] does

[1] "State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, L.L.C. for an Independent Spent Fuel Storage Facility" (Nov. 23, 1997) ("Utah Contentions").

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not comply with NEPA" because it "does not consider the advantages of not transporting 4,000 casks of spent fuel rods thousands of miles across the country" and does not consider the advantages of "not increasing the risk of accidents from additional cask handling, etc." Id. (emphasis added). The State also asserted that the ER "fails to discuss the considerable safety advantages of storing spent fuel near the reactors, whose spent fuel pools will be available for transfers or inspections of degraded fuel." Id. at 170 (emphasis added).

Subsequent to the contention's admission, the Board twice clarified – and further narrowed – its scope. In a May 18, 1998, Memorandum and Order, the Board clarified the scope of Utah Z by dismissing the sabotage-related aspects. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 296 (1998). In a Memorandum and Order dated November 9, 2000, the Board further clarified that Utah Z "is limited only to environmental (as opposed to economic) impacts." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), slip op. at 4 (Nov. 9, 2000).

PFS moved for summary disposition of Utah Z on February 14, 2001,[2] based upon the absence of a genuine issue as to any material fact relevant to the contention. On March 6, 2001, the NRC Staff filed its Response to the PFS Summary Disposition Motion in which it supported PFS's motion.[3] On the same day, the State opposed summary disposition, claiming genuine and material facts remain "regarding the adequacy of the DEIS to discuss the no action alternative."[4]

Essentially in parallel with the PFS Summary Disposition Motion, on February 28, 2001, the State submitted its Tenth Set of Discovery Requests to the Applicant[5] and its Objections and

[2] "Applicant's Motion for Summary Disposition of Contention Utah Z – No Action Alternative" (Feb. 14, 2001) ("PFS Summary Disposition Motion").

[3] See "NRC Staff's Response to Applicant's Motion for Summary Disposition of Utah Contention Z – No Action Alternative" (Mar. 6, 2001).

[4] "State of Utah's Response to Applicant's Motion for Summary Disposition on Utah Contention Z" (Mar. 6, 2001) ("State's Summary Disposition Response") at 4-5. It is in this pleading that, for the first time, the State claims that the scope of Utah Z includes "qualitative criticisms of the adequacy of the ER." Id. at 6.

[5] "State of Utah's Tenth Set of Discovery Requests Directed to the Applicant" (Feb. 28, 2001) ("State's Tenth Request").

Response to Applicant's Sixth Set of Discovery Requests.[6] PFS filed its Objections and Responses to the State's Tenth Request on March 12, 2001.[7] In its Objection and Response, PFS objected to the State's Utah Z discovery requests because they (1) fell outside the scope of the contention or (2) were otherwise improper.

The parties were unable to resolve their differences and the State filed its Motion to Compel on March 19, 2001. The Motion to Compel disputes several PFS objections to Utah Z discovery requests, but does not challenge PFS objections to requests that were: (1) vague; (2) ambiguous; (3) overly broad; (4) overly burdensome,; or (5) based on plainly erroneous assumptions . The Board should not compel a response to these discovery request regardless of its rulings on the other objections and should deny the State's Motion to Compel as to those discovery requests which its Motion discusses.

II. ARGUMENT

The Board should deny the State's Motion to Compel because Applicant properly objected to the identified discovery requests, as discussed below.

A. The State Did Not Contest PFS Objections to Most Utah Z Discovery Requests

PFS properly objected to most of the State's Utah Z discovery requests because they violated general discovery rules.[8] PFS objected to Utah Z discovery requests that were: (1) vague; (2) ambiguous; (3) overly broad; (4) overly burdensome; or (5) based on plainly erroneous assumptions. See PFS Objections and Response at 20-55. As the State has not contested these objections, the Board should not compel a response to these discovery requests regardless of its rulings on the other objections. See, e.g., Texaco Puerto Rico v. Medina, 834 F.2d 242,

[6] "State of Utah's Objections and Response to Applicant's Sixth Set of Discovery Requests to Intervenor State of Utah" (Feb. 28, 2001) ("State's Sixth Response").

[7] "Applicant's Objections and Responses to the State of Utah's Tenth Set of Discovery Requests Directed to the Applicant" (Mar. 12, 2001) ("PFS Objections and Response").

[8] PFS objected to Request for Admission Nos. 1-3, 8-12, 16-27, 31, 33-35, 38, 44-45, 48, 49, 54, 55, 61, 65, 68-75; Interrogatory Nos. 1-6; and Document Request Nos. 1-3 on these grounds.

247 n.3 (1st Cir. 1987) (holding that once a party timely objects to requests for admissions the burden shifts to the party serving the requests to dispute the objections or they are deemed well taken); Brown v. P.S. & Sons Painting, Inc., 680 F.2d 1111, 1115 (5th Cir. 1982) (finding that the court was under no obligation to act regarding requests for admissions responded to by timely objections because no motion was filed to challenge the sufficiency of objections). Accordingly, only Request for Admission Nos. 4-7, 9, 29, 30, 32, 36, 37, 39-43, 46, 47, 50-53, 56-60, 62-64, 66, 67, 76; Interrogatory No. 7; and Document Request No. 4 remain at issue.

B. Discovery Requests Relating to the Substance of the DEIS are Improper as Outside the Scope of Utah Z

The scope of Utah Z is limited by its bases to a claim whether certain issues identified by the State regarding the no action alternative are not discussed in the NRC Staff's Draft Environmental Impact Statement ("DEIS").[9] Virtually all of the State's latest Utah Z discovery requests go beyond this limited scope of the contention.[10] As with Contention Utah C, the State's asserted deficiencies concerning an analysis have been addressed by publication of a new analysis (here the DEIS).[11] Having had its concerns satisfied, the State now seeks to raise a new concern. The State now argues that the scope of Utah Z should be sua sponte enlarged to include challenges to the substance of the DEIS's discussion of the no action alternative. Motion to Compel at 4.[12]

The Board should deny the Motion to Compel and thereby reject the State's legally unsupported attempt to use its discovery requests and opposition to summary disposition to enlarge the scope of Utah Z. The Commission's "longstanding practice requires adjudicatory boards to

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[9] Although the State filed its contentions against the ER (as required under Commission regulation, see 10 C.F.R. § 2.714(b)(2)(iii)), the Board should now consider the State's environmental contentions as challenges to the DEIS. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998).

[10] PFS objected to Request for Admission Nos. 1-12, 16-21, 26-27, 29-76; Interrogatory Nos. 1-7; and Document Request Nos. 1-3 on this ground. PFS admitted Request for Admission Nos. 13-15, 28.

[11] See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-23, 49 NRC 485 (1999).

[12] See also State's Summ. Disposition Resp. at 6.

adhere to the terms of admitted contentions." Claiborne, CLI-98-3, 47 NRC 77, 105 (1998). The "reach of a contention necessarily hinges upon its terms coupled with its stated basis." Public Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988). The "scope of a contention is determined by the 'literal terms' of the contention, coupled with its stated bases." Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), LBP-88-25, 28 NRC 394, 396 (1988). A contention, therefore, is properly viewed as a general allegation focused by the specific assertions in the contention's basis, which provide the specificity necessary for the contention's admission. See Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325 (1998) (vague and unparticularized contentions are inadmissible). These focused assertions, in turn, define the scope of an admitted contention.

Based on the Commission case law, there is no doubt that the scope of Utah Z is limited by its bases. When the language of the contention is properly "coupled" with its basis, Utah Z alleges only that the ER violates NEPA as it does not adequately discuss the 'no action alternative' because the document does not contain a discussion of certain specified issues.[13] Therefore, Utah Z only challenges the existence of specific information in the DEIS, not the adequacy of that information.

PFS's position is entirely consistent with Commission regulations and case law. An intervenor must "include references to the specific portions of the application [or environmental report] that the petitioner disputes and the supporting reasons for each dispute." 10 C.F.R. § 2.714 (b)(2)(iii). The Board has made it clear that a bare contention, without an adequate basis, is inadmissible. See, e.g., LBP-98-7, 47 NRC at 178, 186, 194, 195, 197, 199, 200-201, 202, 204. The Board only admitted the State's contentions "as supported by bases establishing a genuine material dispute adequate to warrant further inquiry." See, e.g., id. at 188, 189, 190,

[13] See supra § I and PFS Summ. Disposition Mot. at 2-3 for a discussion of the specific assertions.

191, 192, 194, 196-97, 198, 199, 200, 203 (emphasis added). The State cannot choose to rely on the specificity in the basis for admissibility, see Calvert Cliffs, CLI-98-25, 48 NRC at 348-50, and then chose to ignore the same basis in determining scope. An "intervenor is not free to change the focus of its admitted contention, at will, as the litigation progresses." Seabrook, ALAB-899, 28 NRC at 97 n.11. The Board should, therefore, reject the State's attempt to change the scope that the State established for Utah Z.

The State had the opportunity to revise the scope of Utah Z, but chose not to do so.

> On issues arising under [NEPA], the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

10 C.F.R. § 2.714(b)(2)(iii) (emphasis added). The State did not revise Utah Z or submit new contentions based on the DEIS, despite a specific opportunity afforded by the regulations and the Board.[14] Now, although the Board can appropriately consider the State's environmental contentions as challenges to the DEIS, see Claiborne, CLI-98-3, 47 NRC 77 at 84, the State cannot amend the contention "at will." The scope of Utah Z does not include the State's belated assertions.

Thus, the scope of Utah Z is limited to the question of whether the DEIS discusses the topics relating to the environmental impacts of the "no action" alternative that the State claims were omitted and not the substance of these discussions. Utah Z challenges only the existence of material in the DEIS.[15] PFS, therefore, properly objected to discovery requests not reasonably

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[14] The Board provided that any contentions based on the DEIS "should be submitted no later than thirty days" after the DEIS was made available. Memorandum and Order (General Scheduling for Proceeding and Associated Guidance) slip op. at 5 (June 29, 1998).

[15] The State admits that the DEIS discusses each of the substantive areas it claimed were not addressed in the ER. State's Sixth Response Discovery Response at 30-32. After it made these admissions, the State attempted to revise

Footnote continued on next page

calculated to lead to the discovery of admissible evidence demonstrating that the environmental impacts of the no action alternative identified in the basis for Utah Z are or are not discussed in the DEIS.

C. Applicant Properly Objected to Discovery on Grounds Other Than the Scope of Utah Z

In addition to the objections set forth in supra §§ II.A and B, PFS raised other objections, as discussed below.

1. Discovery Irrelevant to the No Action Alternative is Impermissible

PFS properly objected to the State's discovery requests regarding Utah Z to the extent that they requested information not related to the DEIS no action alternative.[16] Under the no action alternative analyzed in the DEIS, "[u]tilities would continue to store SNF at their reactor sites" until shipment to a permanent repository. DEIS at 2-43. The State admits that the DEIS "has selected an appropriate 'no action' alternative." State's Sixth Discovery Resp. at 31. Many of the State's Utah Z discovery requests have no relationship to the no action alternative.[17] For example, Request for Admission No. 1 requests PFS to admit that "some utility companies with operating reactors will not store their spent nuclear fuel at the PFS facility." State's Tenth Request at 21. However, given that the no action alternative evaluated in the DEIS assumes on-site storage if the PFSF is not built, where utilities will store spent fuel if the PFSF is built is irrelevant to the contention. See PFS Objections and Response to Request for Admission No. 1.[18] Similarly, several discovery requests concern only PFS membership or business relationships

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the basis for Utah Z, without amending its contention as required, by asserting that it still considers some of the DEIS discussions to be "incomplete" or not "fairly balanced." Id.

[16] PFS objected to Request for Admission Nos. 1-6, 8-12, 26, 29, 30, 36, 37, 40-43, 46, 49, 55-58, 61-76; Interrogatory Nos. 1, 4-7; and Document Request Nos. 1-3 on this ground.

[17] This includes discovery requests related solely to the issue of the need for the facility, which was rejected by the Board in Contention Utah X because of a lack of any genuine dispute and an impermissible attempt to challenge the Commission's regulations or rulemaking-associated generic determinations. LBP-98-07, 47 NRC at 202. PFS objected to Request for Admission Nos. 1, 4-7, 26,29, 30, 36, 37, 40-68; Interrogatory Nos. 1, 5-6; and Document Request Nos. 1-3 on this ground.

[18] See also PFS Objections and Response to Request for Admissions Nos. 2 and 3.

(e.g., Request for Admission No. 40 seeks information on "any written contracts with any non-member customer." Id. at 29.).[19] These types of inquiries do not concern the no action alternative, which assumes on-site storage, and are, therefore, outside the scope of Utah Z.

Utah Z is also limited to the environmental (as opposed to the economic) impacts of the no action alternative.[20] Memorandum and Order (Ruling on Contention Utah Z Discovery Production Requests) (Nov. 9, 2000) at 4. Discovery requests regarding PFS financial considerations or economic information are simply inconsistent with this limitation (e.g., Request for Admission No. 66 seeks an admission that a PFS member has entered into a contract to sell a reactor. State's Tenth Request at 33.). Therefore, such discovery requests are not reasonably calculated to lead to the discovery of admissible evidence.

2. Applicant Properly Objected to Discovery Relevant Only to Arguing the Environmental Superiority of the No Action Alternative

PFS properly objected to the State's discovery requests to the extent that they solely relate to the State's position that the NEPA environmental impact analysis mandates a substantive decision on building the PFSF based on perceived environmental advantages of the no action alternative.[21] It is fundamental law that NEPA "does not mandate particular results." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). NEPA also does not require an agency to select the most environmentally benign option if "other values outweigh the environmental costs."[22] Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC

[19] The State attempts to justify these discovery requests as providing "support for the premise that the proposed PFS facility would decrease the probability of premature shutdown as operating reactors." State's Tenth Request at 29. This premise, and the information sought in the requests, is, however, irrelevant to the no action alternative, which assumes no PFSF facility.

[20] PFS objected to Request for Admission Nos. 40-68; Interrogatory Nos. 1, 5-7; and Document Request No. 2 on this ground.

[21] PFS objected to Request For Admission Nos. 38, 39, 69-75; Interrogatory No.; and Document Request No. 2 on this ground.

[22] Nor does NEPA require the NRC, in licensing a facility, to determine the most environmentally preferable site. The "licensing process is structured for rejection or acceptance of the proposed site rather than choice of sites." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 529 (1977).

77, 88 (quoting Robertson, 490 U.S. at 350). The State has grossly misread NEPA and related case law in arguing that "the only reason the PFS facility could naturally be 'preferred' is if the status quo alternative were not safe or feasible." State's Summ. Disposition Resp. at 15.

The State's discovery requests, to the extent they seek information to mandate the selection of the no action alternative because of purported environmental advantages, are beyond even the remotest penumbra of NEPA and, therefore, the scope of Utah Z. For example, Request for Admission No. 38 seeks an admission that "environmental impacts from construction of an on-site ISFSI at individual reactor would likely be less than the impacts for the proposed PFS facility." State's Tenth Request at 28. PFS properly objected to these discovery requests because they are not reasonably calculated to lead to the discovery of admissible evidence.

3. Applicant Properly Objected to Discovery Duplicative of the Commission's Generic Environmental Findings

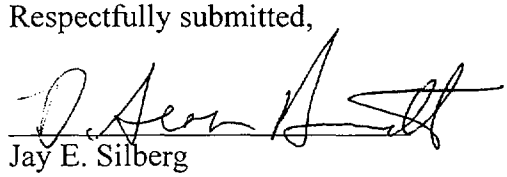
PFS properly objected to the State's Utah Z discovery requests to the extent that they relate to information duplicative of the Commission's generic environmental analysis and challenge the Commission's regulations.[23] PFS and the State agree that the Commission has found, as a matter of law, that spent nuclear fuel can be safely stored at reactor sites without a significant incremental effect on the quality of the human environment. See 10 C.F.R. § 51.23(a); PFS Summ. Disposition. Mot. at 16; State's Summ. Disposition Resp. at 10 n.6. The State now seeks discovery on issues already resolved by rulemaking (e.g., Request for Admission No. 39 seeks information on the "environmental impacts of construction of on-site ISFSI at individual reactors" from the "amount of concrete and asphalt." State's Tenth Request at 28-29.). Since the State cannot "attack by way of discovery" Commission rules without petitioning the Commission to do so (which the State has not done here), the State's discovery requests regarding this information are improper. See 10 C.F.R. § 2.758.

[23] PFS objected to Request For Admission Nos. 6, 8-12, 18-25, 35, 47, 59, 68, 69; Interrogatory Nos. 1-7; and Document Request Nos. 1-3 on this ground.

III. CONCLUSION

As noted above, the State did not challenge PFS's objections to the majority of the Utah Z discovery requests. Given the absence of any State objections thereto, there is no bases to compel PFS to answer those requests.[24] With respect to the remainder of the State's discovery requests, the Board should deny the State's Motion to Compel Applicant to Respond to the State's Tenth Set of Discovery Requests on Utah Contention Z for the reasons discussed above.

Respectfully submitted,



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[24] See supra note 8 for an enumeration of discovery requests where the State did not dispute the PFS objections.

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Response to State of Utah's Motion to Compel Applicant to Respond to State's Tenth Set of Discovery Requests on Utah Contention Z" 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 26th day of March 2001.

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