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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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 MOTION TO COMPEL ANSWERS
TO APPLICANT'S DISCOVERY REQUESTS TO INTERVENOR OGD**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") files this motion to compel Ohngo Gaudadeh Devia ("OGD") to answer interrogatories and produce documents pursuant to 10 C.F.R. § 2.740(f)(1). PFS files this motion after receiving responses to its Second Set of Discovery Requests¹ from OGD that were deficient and incomplete and after repeatedly attempting to resolve its differences with OGD without involving the Licensing Board.

I. STATEMENT OF THE ISSUES

On February 16, 2001, the Applicant served OGD with its second set of discovery requests. On March 8, 2001, after having been prompted by a telephone call from the

¹ Applicant's Second Set of Formal Discovery Requests to Intervenor OGD (Feb. 16, 2001) ("PFS 2nd Req."); Ohngo Gaudadeh Devia's (OGD) Supplemental Responses to Applicant's First Set of Discovery Requests and Initial Responses to Applicant's Second Set of Discovery Requests (March 8, 2001) ("OGD Resp."); Ohngo Gaudadeh Devia's (OGD) Second Supplemental Responses to Applicant's First Set of Discovery Requests and Initial Responses to Applicant's Second Set of Discovery Requests (March 26, 2001) ("OGD Supp. Resp.").

Applicant on March 5 that its responses were overdue,² OGD served the Applicant with its responses. Applicant believed that OGD's responses were generally deficient, in that they were vague and unspecified. Also, OGD had failed to provide witness declarations to support its interrogatory responses and its denials of certain requests for admission. See 10 C.F.R. §§ 2.740b(b), 2.742(b).

Immediately upon receipt of OGD's response, counsel for Applicant contacted counsel for OGD to discuss OGD's responses. Counsel reached an agreement that OGD would supplement its responses to correct the identified deficiencies by Friday, March 16, 2001. Letter from Sean Barnett, counsel for PFS, to Joro Walker, counsel for OGD (March 12, 2001) (attached as Exhibit 1). By March 16, however, no supplemental responses and no explanations as to their absence were received from OGD.

On Tuesday, March 20, 2001, counsel for Applicant again contacted counsel for OGD regarding the responses and was informed that OGD had been unable to provide them by March 16, in part because counsel's daughter had been sick, but that OGD would certainly provide the responses by Friday, March 23, 2001. Counsel for PFS agreed to extend the time for supplementing OGD's responses to March 23, but informed counsel for OGD that if the responses were not forthcoming, PFS would file a motion to compel

² Letter from Paul Gaukler, counsel for PFS, to Joro Walker, counsel for OGD (Mar. 5, 2001) (PFS agreed to extend the time for OGD's response to March 7, 2001). Responses to interrogatories and requests for admission are due in 10 days (Feb. 26 here) and responses to document requests are due in 15 days (Mar. 5 here). See Memorandum and Order (Additional General Schedule Guidance and Informal Discovery Status Conference Schedule) (Aug. 20, 1998) at 4; Memorandum and Order (General Schedule for Proceeding and Associated Guidance) (June 29, 1998) at 7.

with the Licensing Board. Letter from Sean Barnett, counsel for PFS, to Joro Walker, counsel for OGD (March 20, 2001). By March 23, PFS still had received no supplemental responses from OGD and no explanations as to their absence.

Finally, on March 26, 2001, PFS received a supplemental response from OGD, OGD Supp. Resp., supra note 1, that remains deficient in several respects. Counsel for PFS contacted counsel for OGD regarding the supplemental responses but counsel were unable to resolve their differences.³

PFS therefore files this motion to compel. PFS has been more than patient with OGD regarding its responses to PFS's discovery requests. OGD's failure to produce complete responses after repeated discussions with counsel and OGD's formally agreeing to supplement its responses leaves PFS no alternative but to file this motion.

II. ARGUMENT

It is imperative that OGD answer the Applicant's discovery requests directly, completely and in a timely manner. "[T]he failure to fulfill discovery obligations [not only] unnecessarily delay[s] a proceeding, it is also manifestly unfair to the other parties." Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1417 (1982).

The Applicants in particular carry an unrelieved burden of proof in Commission proceedings. Unless they can effectively inquire into the positions of the intervenors, discharging that burden may be impossible.

³ Telephone call from Sean Barnett, counsel for PFS, to Joro Walker, counsel for OGD (Mar. 27, 2001).

Id. (quoting Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 338 (1980)).

As set forth in the letter from counsel for PFS to counsel for OGD attached as Exhibit 1, OGD's responses to PFS's discovery requests were deficient in several respects. While OGD's supplemental response of March 26 finally cures some of the deficiencies,⁴ several remain and are the subject of this motion.

First, in Interrogatory No. 8, PFS asked OGD for the bases of its assertion that a majority of the Skull Valley Band of Goshutes does not support the PFS ISFSI and the reasons for OGD's disagreement with the conclusion in the Draft Environmental Impact Statement (DEIS) for the PFSF that the PFS project would result in a net increase in Band members living on the Reservation. PFS 2nd Req. at 3. OGD responded that the basis for OGD's assertion regarding the support of the Band members for the PFS project were detailed "in affidavits filed with the United States District Court for the District of Utah in State of Utah v. United States Department of the Interior, Case No. 2:98 CV 380 K" and that "other evidence submitted relative to this case provides a further basis for this claim." OGD Resp. at 4. OGD later added that it intends to rely on "all evidence submitted in that case by the 'Blackbear' Plaintiffs, as contained in affidavits, declarations and other supporting or evidentiary documents and records." OGD Supp. Resp. at 2.

⁴ For example, the supplemental response cured the deficiency PFS had identified with respect to the answer to Request for Admission No. 3. Compare Exh. 1 at 1-2 with OGD Supp. Resp. at 2. Also, counsel for OGD stated that a declaration attesting to the OGD responses to PFS interrogatories and requests for

This response is inadequate, in that “the interrogating party should not need to sift through documents or other materials to obtain a complete answer [to its question].” Byron, ALAB-678, 15 NRC at 1421 n.39. OGD had agreed to identify the specific documents in Utah v. Department of the Interior and portions thereof that provide the bases for its claim regarding the support of Skull Valley Band members for the PFS project. Exh. 1 at 1-2. PFS requests that OGD be compelled to do as it had agreed.

Second, in response to Interrogatory No. 8, OGD also stated that:

The reasons for which OGD disagrees with the assertion that the project would result in a net gain for Band members are that: 1) individual members of the Band have been, are being and apparently will be denied economic, social and other benefits, and thereby suffering disparate adverse impacts, as a result of their real and/or perceived opposition to the PFS facility or as a result of other issues relevant to the facility; . . .

OGD Resp. at 4. This response is inadequate, in that the term “as a result of other issues relevant to the facility” is vague and thus, the answer does not fully identify the reasons why OGD asserts that the PFS project would not result in a net gain for the Skull Valley Band.⁵ See Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 583 (1975) (interrogatory answers “must be complete, explicit and responsive”); 10 C.F.R. § 2.740(f)(1) (“[a]n evasive or incomplete answer or response shall be treated as a failure to answer or respond”); see also Memorandum and Order (Granting

admission (where such were denials) had been mailed to PFS. Electronic mail from Joro Walker, counsel for OGD, to Sean Barnett, counsel for PFS (Mar. 26, 2001).

⁵ In its supplemental response, OGD Supp. Resp. at 3, OGD explained the meaning of the term “social and other benefits,” to which PFS also had earlier objected as vague and unspecified. See Exh. 1 at 2.

Motion to Compel Interrogatory Answers) (Nov. 12, 1999) at 3. As stated by the Pilgrim board:

[An intervenor] has a responsibility to specify the facts, i.e., the data, information and documents, if any, upon which he intends to rely and upon which he has relied in support of his intervention, so that parties may be advised in advance with regard to the nature of the Intervenor's case.

Pilgrim, LBP-75-30, 1 NRC at 586 (emphasis added). OGD had agreed to clarify its response. Exh. 1 at 2. If OGD does not fully divulge the reasons for its disagreement with the analyses and conclusions of the DEIS, PFS will be unable to resolve OGD's contention. Thus, OGD must be compelled to fully explain the terms in its answer to the interrogatory.

Third, in Interrogatory No. 9, PFS asked OGD to “[i]dentify and fully explain in each specific respect in which OGD claims that the [DEIS] does not adequately consider any of the environmental justice claims previously raised by OGD” Similarly to its response to Interrogatory No. 8, OGD responded that:

The Draft EIS is deficient because it fails to analyze adequately or at all the fact that: 1) individual members of the Band have been, are being and apparently will be denied economic, social and other benefits, and thereby suffering disparate adverse impacts, as a result of their real and/or perceived opposition to the PFS facility or as a result of other issues relevant to the facility; . . .

OGD Resp. at 4-5. This response is similarly inadequate, in that the term “as a result of other issues relevant to the facility” is vague and thus, the answer does not fully describe

OGD's belief as to why the DEIS is inadequate.⁶ See Pilgrim, LBP-75-30, 1 NRC at 583; 10 C.F.R. § 2.740(f)(1). Without a clear and complete answer, PFS will be unable to resolve this contention. OGD had agreed to clarify its response. Exh. 1 at 2. PFS requests that OGD be compelled to do as it had agreed.

Fourth, OGD also responded to Interrogatory No. 9 that: "2) the operation and construction of the proposed facility will have disproportionate adverse impacts on the Skull Valley Band, including its cultural integrity . . ." OGD Resp. at 5 (emphasis added). This response is inadequate because the word "including" indicates that OGD did not "[i]dentify and fully explain in each specific respect" in which OGD claims that the DEIS analysis was inadequate. PFS 2nd Req. at 3-4 (emphasis added). OGD had agreed to either delete the word "including" or provide PFS with a complete list of the "disproportionate adverse impacts on the Skull Valley Band" regarding which OGD asserts that the consideration in the DEIS was inadequate. Exh. 1 at 3. In its supplemental response, OGD defined the term "including its cultural integrity" to mean effects on "the community, tradition, and culture of the Skull Valley Band . . .," OGD Supp. Resp. at 4, but did not make it clear whether its response to the interrogatory was a complete description of the disproportionate and adverse impacts it asserts the Band will suffer.

⁶ As it did with Interrogatory No. 8, OGD explained the meaning of the term "social and other benefits" in its supplemental response. OGD Supp. Resp. at 4.

Therefore, the response remains deficient and PFS requests that OGD be compelled to provide a complete answer.⁷

Finally, in Document Request No. 4, PFS requested OGD to produce all documents related to OGD's allegations that Skull Valley Band members had received improper treatment by the Band's government related to the lease with PFS and related to the transfer of lease funds. PFS 2nd Req. at 4. In Document Request No. 5, PFS requested OGD to produce documents supporting or related to OGD's claim that the Skull Valley Band government does not have the support or has coerced the support of Band members for the PFS ISFSI. *Id.* In response to both requests, OGD stated, in part, that "[o]ther relevant documents have been filed in as evidence in State of Utah v. United States Department of the Interior, Case No. 2:98 CV 380 K" OGD Resp. at 6.⁸ OGD later added that "OGD intends to rely on all evidence submitted in that case by the 'Blackbear' Plaintiffs, as contained in affidavits, declarations and other supporting or evidentiary documents and records." OGD Supp. Resp. at 5. The proper response to a document request is to either produce the requested documents or, where they are pub-

⁷ Counsel for OGD stated that the use of the word "including," rather than a term such as "consisting of" was intentional, in that OGD did not wish to limit its ability to allege specific deficiencies with the DEIS in the future. Telephone call from Barnett to Walker, *supra* note 3. At this point in the litigation, over eight months after the publication of the DEIS, OGD should have completely and specifically determined what it believes the deficiencies of the DEIS are and thus there is no reason OGD should not be compelled to answer PFS's interrogatory fully and completely.

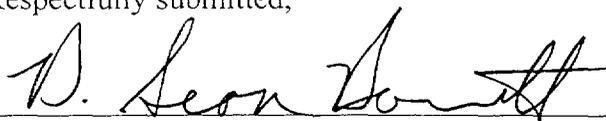
⁸ While OGD had also responded that it had no documents other than those it had already produced, OGD Resp. at 6, counsel for OGD stated in the telephone conversation with counsel for PFS on March 20 that upon further searching, OGD did indeed have additional documents responsive to PFS's requests. Telephone conference between Sean Barnett, counsel for PFS, and Joro Walker, counsel for OGD (March 20, 2001); *see also* OGD Supp. Resp. at 1.

licly available, to identify them by location, title and page reference. 10 C.F.R. § 2.740(b)(1). Nor should OGD be able to evade the duty to produce only documents reasonably calculated to contain discoverable evidence by producing an impenetrable mass of documents (e.g., “all evidence” in Utah v. Department of the Interior) containing material wholly unrelated to Contention OGD O. OGD had agreed that to the extent that it did not produce the requested documents, it would identify them with specificity. Exh. 1 at 3. PFS requests that OGD be compelled to do as it had agreed.

III. CONCLUSION

After repeated PFS attempts to resolve this issue with OGD, OGD still has not produced full and complete responses to PFS’s discovery requests. OGD’s delay at this point is inexcusable. PFS must have such information in order to meet its burden of proof in resolving OGD’s contention. Therefore, the Board should compel OGD to produce the specified information sought by the Applicant’s Discovery Requests.

Respectfully submitted,



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March 28, 2001

**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
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(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Motion to Compel Answers to Applicant's Discovery Requests to Intervenor OGD 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 28th day of March 2001.

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D. Sean Barnett

Exhibit 1

March 12, 2001

Joro Walker, Esq.
Land and Water Fund of the Rockies
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Salt Lake City, UT 84105

Re: OGD Responses to PFS Discovery Requests

Dear Joro:

This letter is to summarize our conversation of March 8, 2001 regarding Ohngo Gaudadeh Devia's (OGD) Supplemental Responses to Applicant's First Set of Discovery Requests and Initial Responses to Applicant's Second Set of Discovery Requests, filed March 8, 2001.

In its first set of interrogatories to OGD, on May 18, 1999, in Contention OGD O Interrogatory No. 6, PFS had requested OGD to identify and describe "each of the specific environmental impacts of materials and activities at, or emanating from, the facilities enumerated in Contention OGD O that OGD asserts would be cumulative with the environmental impacts of the . . . PFS ISFSI . . ." On May 28, 1999, OGD responded that it "ha[d] not yet finished its analysis of these specific and cumulative impacts" and that "[w]hen OGD completes its analysis, it will update this interrogatory accordingly." In its discovery response of March 8, 2001, OGD stated that "OGD is planning on completing its own cumulative impact analysis, but has not yet secured the funding or the expert to do so." OGD now confirms that to date it has initiated no cumulative impacts analysis.

In OGD Contention O Request for Admission No. 3, PFS had asked OGD, "Do you admit that in order to contribute to a cumulative impact, a facility must have some impact in the first place." OGD denied the request, stating that "an event could have an unquantifiable impact in isolation while it could have a cumulative or synergistic impact when combined with another event." OGD agreed to amend its response to delete the word "unquantifiable," so that it would read, "an event could have no impact in isolation while it could have a cumulative or synergistic impact when combined with another event." OGD agreed to send its amended response to PFS in writing by March 16, 2001.

In OGD Contention O Interrogatory No. 8, PFS asked OGD for the bases of its assertion that a majority of the Skull Valley Band of Goshutes does not support the PFS ISFSI and the reasons for OGD's disagreement with the conclusion in the Draft

Joro Walker, Esq.
March 8, 2001
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Environmental Impact Statement (DEIS) for the PFSF that the PFS project would result in a net increase in Band members living on the Reservation. OGD responded that the basis for OGD's assertion regarding the support of the Band members for the PFS project were detailed "in affidavits filed with the United States District Court for the District of Utah in State of Utah v. United States Department of the Interior, Case No. 2:98 CV 380 K" and that "other evidence submitted relative to this case provides a further basis for this claim." OGD has agreed to identify the specific documents in Utah v. Department of the Interior and portions thereof that provide the bases for its claim regarding the support of Skull Valley Band members for the PFS project. OGD agreed to update its response to the interrogatory in writing to PFS by March 16, 2001.

Also in response to Interrogatory No. 8, OGD stated that:

The reasons for which OGD disagrees with the assertion that the project would result in a net gain for Band members are that: 1) individual members of the Band have been, are being and apparently will be denied economic, social and other benefits, and thereby suffering disparate adverse impacts, as a result of their real and/or perceived opposition to the PFS facility or as a result of other issues relevant to the facility; . . .

OGD has agreed to fully explain the terms "social and other benefits" and "as a result of other issues relevant to the facility." OGD agreed to update its response to the interrogatory in writing to PFS by March 16, 2001.

In OGD O Interrogatory No. 9, PFS asked OGD to "[i]dentify and fully explain in each respect in which OGD claims that the [DEIS] does not adequately consider any of the environmental justice claims previously raised by OGD" OGD responded that:

The Draft EIS is deficient because it fails to analyze adequately or at all the fact that: 1) individual members of the Band have been, are being and apparently will be denied economic, social and other benefits, and thereby suffering disparate adverse impacts, as a result of their real and/or perceived opposition to the PFS facility or as a result of other issues relevant to the facility; . . .

As with Interrogatory No. 8, OGD agreed to fully explain the terms "social and other benefits" and "as a result of other issues relevant to the facility."

ShawPittman

Joro Walker, Esq.
March 8, 2001
Page 3

OGD also responded to Interrogatory No. 9 that: "2) the operation and construction of the proposed facility will have disproportionate adverse impacts on the Skull Valley Band, including its cultural integrity . . ." (emphasis added) OGD agreed to either delete the word "including" or provide PFS with a complete list of the "disproportionate adverse impacts on the Skull Valley Band" regarding which OGD asserts that the consideration in the DEIS was inadequate. OGD agreed to update its responses to the interrogatory in writing to PFS by March 16, 2001.

In OGD Contention O Document Request No. 4, PFS requested OGD to produce all documents related to OGD's allegations that Skull Valley Band members had received improper treatment by the Band's government related to the lease with PFS and related to the transfer of lease funds. In Document Request No. 5, PFS requested OGD to produce documents supporting or related to OGD's claim that the Skull Valley Band government does not have or has coerced the support of Band members for the PFS ISFSI. In response to both requests, OGD stated, in part, that "[o]ther relevant documents have been filed in as evidence in State of Utah v. United States Department of the Interior, Case No. 2:98 CV 380 K . . ." OGD has agreed that to the extent that it does not produce such documents, it will identify the documents with specificity. OGD agreed to update its responses to the document requests in writing to PFS by March 16, 2001.

While we did not discuss the matter on the phone, OGD did not file a declaration of the person or people responsible for OGD's responses to PFS's interrogatories and PFS's requests for admission, where OGD's response was a denial. Such a declaration or declarations are required under 10 C.F.R. §§ 2.740b(b), 2.742(b). PFS requests that OGD file the declarations at the time it updates its responses to PFS's discovery requests.

Sincerely,



Sean Barnett