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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 FOR ENTRY OF ORDER COMPELLING
INTERVENOR OGD TO ANSWER APPLICANT'S DISCOVERY REQUESTS**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") files this motion requesting the Atomic Safety and Licensing Board ("Licensing Board" or "Board") to enter an order requiring Ohngo Gaudadeh Devia ("OGD") to fully and completely answer the interrogatories that were subject to PFS's March 28, 2001 motion to compel.¹ PFS files this motion after receiving responses to the interrogatories² that, after a period of over two months of attempting to resolve these issues with OGD, remain deficient and incomplete. This is despite OGD's most recent assurance "that OGD [would] provide

¹ Applicant's Motion to Compel Answers to Applicant's Discovery Requests to Intervenor OGD (Mar. 28, 2001) ("PFS Mot.").

² Applicant's Second Set of Formal Discovery Requests to Intervenor OGD (Feb. 16, 2001) ("PFS 2nd Req."); see 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 (Mar. 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 (Mar. 26, 2001) ("OGD Supp. Resp."); Ohngo Gaudadeh Devia's (OGD) April 25, 2001 Additional Response to Private Fuel Storage's (PFS) Motion to Compel (Apr. 25, 2001) ("OGD Add. Resp."); Ohngo Gaudadeh Devia's (OGD) Second Additional Response to Private Fuel Storage's (PFS) (Renewed) Motion to Compel (May 4, 2001) ("OGD 2nd Add. Resp.").

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answers to [the] subject discovery requests on or before the 1st day of May 2001.”³

Given OGD’s failure to respond to the specific questions posed by PFS, the Board should order OGD to respond to the subject interrogatories forthwith.

On February 16, 2001, PFS filed the subject discovery requests. On March 28, 2001, after numerous unsuccessful attempts to obtain full and complete answers,⁴ PFS filed its motion to compel discovery with respect to Interrogatories No. 8 and 9 of its second discovery requests to OGD.⁵ On April 11, the firm of Steadman & Shepley, LC, filed its notice of appearance as OGD counsel and filed a motion for extension of time to respond to PFS’s motion.⁶ On April 17, the Licensing Board granted OGD until April 23 to respond to the motion.⁷ On April 20, OGD counsel contacted PFS counsel and stated that OGD would provide responses to PFS’s outstanding discovery requests.⁸ On April 23, OGD filed its response to PFS’s motion stating to the Board and the parties that:

PFS and OGD have . . . agreed by stipulation that OGD will provide answers to subject discovery requests on or before the 1st day of May, 2001, including providing the list of documents from the specified litigation that may be offered as evidence in support of OGD’s environmental justice contention on or before the 25th day of April, 2001.

³ Ohngo Gaudadeh Devia’s (OGD) Response to Private Fuel Storage’s (PFS) Motion to Compel (Apr. 23, 2001) (“OGD Mot. Resp.”).

⁴ See PFS Motion at 1-3.

⁵ *Id.* at 4-9. PFS also filed its motion with respect to Document Request Nos. 4 and 5. Those document requests, however, are not the subject of this motion.

⁶ Request for Extension of Time for Ohngo Gaudadeh Devia (OGD) (Apr. 11, 2001); see Applicant’s Response to OGD Request for Extension of Time (Apr. 16, 2001).

⁷ Memorandum and Order (Granting Motion to Compel Response Filing Extension Motion) (Apr. 17, 2001).

⁸ Telephone call from Duncan Steadman, counsel for OGD, to Sean Barnett, counsel for PFS (Apr. 20, 2001).

OGD Mot. Resp.

On April 25, OGD filed a partial additional response to PFS Interrogatory No. 8 (in response to which it had originally cited the “documents from the specified litigation”).⁹ This response was essentially no more adequate or complete than OGD’s initial response, and on April 27, 2001, to preserve its position on the record, PFS renewed its motion to compel,¹⁰ understanding that additional OGD responses were due on May 1, 2001 that might conceivably moot the renewed motion.¹¹ On April 30, 2001, the Licensing Board entered an Order scheduling responses to the renewed motion to compel on or before Friday, May 4, 2001.¹²

On Tuesday, May 1, 2001, among other matters, counsel for Applicant confirmed with counsel for OGD that OGD would be filing additional discovery responses on that day, as had been previously stipulated.¹³ However, contrary to OGD counsel’s represen-

⁹ PFS moved to compel with respect to two aspects of Interrogatory No. 8. The first concerned OGD’s basis for its assertion that a majority of the Skull Valley Band does not support the PFSF and the second concerned the reasons for which OGD disagrees with the conclusion in the DEIS that the PFSF would result in a net increase in Band members living on the Reservation. See PFS Motion at 4-6. OGD’s April 25, 2001 additional response purported to address only the first of these two concerns.

¹⁰ Applicant’s Motion to Renew Motion to Compel Answers to Applicant’s Discovery Requests to Intervenor OGD (Apr. 27, 2001) (“PFS Renewed Mot.”).

¹¹ In a conversation with PFS counsel on April 26, Mr. Steadman stated for the first time that OGD understood that its April 25 response to Interrogatory No. 8 was inadequate and that OGD would supplement that response with its written response due May 1. Telephone call from Duncan Steadman, counsel for OGD, to Sean Barnett, counsel for PFS (Apr. 26, 2001). That position was not what PFS understood from previous conversations with Mr. Steadman and it is contradicted by the belligerence of the response OGD filed on April 25, see OGD Add. Resp. at 2-3 & n.1, and, therefore, PFS renewed its motion to compel to preserve its position for the record.

¹² Order (Schedule for Response to Renewed Motion to Compel) (Apr. 30, 2001).

¹³ Telephone call from Jay Silberg and Paul Gaukler, counsel for PFS, to Duncan Steadman, counsel for OGD (May 1, 2001).

tation, Applicant did not receive any additional responses on Tuesday, May 1. On Wednesday, May 2, 2001, counsel for PFS called counsel for OGD twice to inquire why no response had been received without receiving an explanation from OGD.¹⁴ On May 3, at OGD's deposition of PFS Project Director, John Donnell, and Skull Valley Band Chairman Leon Bear, PFS witnesses for Contention OGD O, counsel for OGD stated that OGD did not file its responses on May 1 because it believed the Board's April 30 order provided until Friday, May 4 to file them.¹⁵ PFS disagreed with OGD's interpretation of the Board's order but nonetheless waited to see what OGD would produce on May 4 before filing this motion.

On May 4, OGD filed its Second Additional Response to PFS's motion to compel that contained answers to Interrogatory Nos. 8 and 9 that remain deficient and incomplete. OGD's response also lacked the required declaration or affidavit attesting to the veracity of interrogatory responses. See 10 C.F.R. § 2.740b(b). Therefore, PFS requests the Board to order OGD to respond forthwith to those discovery requests.¹⁶

First, PFS moved to compel on Interrogatory No. 8 because OGD failed to specify OGD's basis for its assertion that a majority of the Skull Valley Band does not support

¹⁴ Telephone call from Paul Gaukler, counsel for PFS, to Duncan Steadman, counsel for OGD (May 2, 2001). Counsel for OGD promised to check with his colleague who was also working on the case and call back. Counsel for Applicant did not hear back and called again the same day, and not reaching counsel, left a message for OGD counsel to call back. Telephone call from Paul Gaukler, counsel for PFS, to Duncan Steadman (May 2, 2001) who was unavailable, and message was left with the receptionist.

¹⁵ Conversation between Duncan Steadman, counsel for OGD, and Jay Silberg, counsel for PFS (May 3, 2001).

¹⁶ After PFS's extended but unsuccessful attempt to resolve these issues with OGD without involving the Licensing Board, PFS does not believe that any further attempt to resolve them by contacting OGD directly would be fruitful—at this point the parties are at an impasse.

the PFSF. See supra note 9; PFS Mot. at 4-6, PFS Renewed Mot. at 3-4. OGD maintains that because PFS was a party to the case, a general citation to documents on a court docket is a sufficient response to the specific question posed by Interrogatory No. 8. OGD 2nd Add. Resp. at 2-4. OGD then adds a list of documents from the docket, some of which are voluminous, without explaining how they pertain to OGD's basis for its assertion that a majority of the Skull Valley Band does not support the PFSF. Id. at 3-4. Furthermore, prior to PFS's filing its motion to renew its motion to compel, OGD counsel stated to PFS counsel that OGD would also provide a written response to the first part of Interrogatory No. 8 that directly answered PFS's question. PFS Renewed Mot. at 2 n.8. OGD has filed no such response. As PFS has previously pointed out, an interrogatory response is deficient if it requires PFS to sift through documents to obtain a complete answer to its question. PFS Mot. at 5 (quoting Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1421 n.39 (1982)). Here, PFS posed a specific question to OGD and OGD has simply failed to answer it, leaving PFS to sift through the listed documents, plus "associated affidavits, declarations and support documents," see OGD 2nd Add. Resp. at 4, and guess as to the basis for the claim in Contention OGD O at issue. This is impermissible and the Board should compel OGD to answer PFS's interrogatory directly.

Second, PFS moved to compel on Interrogatory Nos. 8 and 9 because OGD provided nearly identical, vague answers to questions as to 1) the reasons for which OGD disagrees with the conclusion in the DEIS that the PFSF would result in a net increase in Band members living on the Reservation (Interrogatory No. 8) and 2) the specific re-

spects in which OGD claims that the DEIS does not adequately consider any of the environmental justice claims previously raised by OGD (Interrogatory No. 9). See PFS Mot. at 5-7. OGD now provides supplemental responses that remain impermissibly vague. OGD makes terse claims about “improper changes in purported tribal government,” “associated improper actions,” improper dealings,” and “corruption and disparate adverse impacts,” OGD 2nd Add. Resp. at 5, without any specifics as to the actions, the parties to the actions, the alleged impacts resulting from the actions, and the relevance thereof—if any—to Contention OGD O. Thus, PFS asks that the Board order OGD to provide complete and specific responses to its interrogatories.

Third, PFS also moved to compel on Interrogator No. 9 because OGD provided an incomplete response, in that OGD failed to specify all of the disproportionate adverse impacts it asserted were inadequately addressed in the DEIS. See PFS Mot. at 7-8.¹⁷ OGD now claims that the DEIS’s analyses of potentially adverse risks to health and environment are inadequate because the DEIS does not consider that:

any health or environmental risk can potentially present a disproportionate risk depending on the circumstances of the risk and the conditions and factors at play in the interaction with these circumstances, with the low income and minority populations.

OGD 2nd Add. Resp. at 5. Nevertheless, OGD does not specify in any way whatsoever how that general allegation pertains to OGD or the Skull Valley Band of Goshutes and the PFSF. It does not identify any circumstances, risks, conditions, or factors that apply

¹⁷ Indeed, then-counsel for OGD indicated that OGD’s provision of an incomplete response was deliberate, so as to allow OGD flexibility to allege additional deficiencies in the DEIS in the future. PFS Mot. at 8 n.7.

to OGD or the Band and the PFS project that would suggest that the impacts analyzed in the DEIS are disproportionate. Thus, it is impossible for PFS to identify the specific respects in which OGD believes the DEIS's analysis is deficient regarding OGD or the Band. Therefore, PFS asks the Board to order OGD to provide a complete and specific answer to its interrogatory.

PFS filed the discovery requests in question here on February 16. For over two months, PFS has attempted to obtain full and complete answers to its questions in order to resolve the issues raised in Contention OGD O. In response, OGD has failed to keep one empty promise after another, ultimately providing answers that are sorely lacking under the NRC's discovery rules. Therefore, for the foregoing reasons, PFS moves the Board to order OGD to provide forthwith full and complete answers to PFS's discovery requests.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Sean Barnett", is written over a horizontal line.

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Dated: May 7, 2001

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NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22
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CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Motion for Entry of Order Compelling Intervenor OGD to Answer Applicant's Discovery Requests 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 7th day of May 2001.

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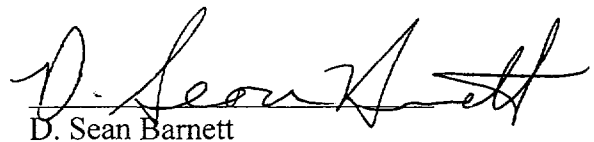
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