

September 17, 2001 (4:37PM)

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of:	)	Docket No. 72-22-ISFSI
	)	
PRIVATE FUEL STORAGE, LLC	)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel	)	
Storage Installation)	)	September 12, 2001

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**STATE OF UTAH'S MOTION TO STRIKE EXHIBIT 1 TO APPLICANT'S  
RESPONSE TO STATE OF UTAH'S SECOND REQUEST TO MODIFY THE  
BASES OF LATE-FILED CONTENTION UTAH QQ**

On September 7, 2001 PFS filed a fifteen page response to State of Utah's Second Request to Modify the Bases of Late-Filed Contention Utah QQ in Response to More Revised Calculations from the Applicant ("State's 2nd Request to Modify Utah QQ"). Included with the Applicant's Response is Exhibit 1, which PFS describes as "a matrix summarizing the prior history of the claims asserted by the State in its Second Request." PFS Response at n. 3. The Response also contains a Declaration by Paul J. Trudeau, and Exhibit 1-5 thereto, which are for the most part excerpts from various calculations packages. PFS's Response contains two Exhibit 1s. This Motion relates to Exhibit 1 to the Response and not to Exhibit 1 of Mr. Trudeau's Declaration.

The State moves to strike PFS Response Exhibit 1, titled "*Prior History of Claims Raised in State's Second Request to Modify the Bases of Proposed Contention Utah QQ*" on the grounds that PFS has violated the Board's February 9, 2000 procedural directive that, absent leave of the Board, responses to contentions are limited to fifteen pages, and the factual evidence presented in Exhibit 1 is selective and unreliable.

## DISCUSSION

### A. PFS Has Used Exhibit 1 to Respond to the State's Contention Modification Request in Violation of the Board's Procedural Directive.

PFS filed a fifteen page response to the State's 2nd Request to Modify Utah QQ.

The Response contains general assertions alleging that the State has not filed an admissible new contention. PFS Response at 7-14. In Exhibit 1, however, PFS attempts to pinpoint specific support for its allegations. The only reference to Exhibit 1 in PFS's Response is in footnote 3; there is no further discussion of Exhibit 1 in PFS's Response.

Exhibit 1 excerpts out of the State's Request twelve separate issues, attempts to summarize the State's claims, and responds with a description of where PFS claims there is information on the issue in PFS licensing or other documents. Exhibit 1 does not have a sponsoring witness. It is not part of Mr. Trudeau's Declaration. There is no indication of who prepared Exhibit 1 and the documents referred to are not attached to Exhibit 1. As it is an exhibit to PFS's Response, it should be treated as part of PFS's Response. Accordingly, this three page summary exhibit is a mechanism by which PFS has attempted to circumvent the Board's Order that responses to contentions are limited to fifteen pages in length.

The Presiding Officer has the power to "[r]egulate the course of the hearing and the conduct of the participants." 10 CFR § 2.718(e). Moreover, the Presiding Officer may reprimand a party or its representative who refuses to comply with its directions. *Id.* § 2.713(c). The Board has issued an Order clearly stating that responses to contentions may not, without leave of the Board, exceed fifteen pages in length. Board Order dated February 9, 2000; *see also* Board Order (Ruling on Discovery Motions and Request to Extend Time to

Complete Depositions) dated May 29, 2001 at n. 3. PFS has not requested leave of the Board to file Exhibit 1. The requested relief under this Motion to Strike is an appropriate mechanism to ensure adherence to the Board's orders. Exhibit 1 does not comply with the Board's February 9, 2000 Order and, therefore, it should be stricken from the record.

**B. Exhibit 1 Presents Factual Evidence That Is Selective and Unreliable and, in Part, Refers to Documents That Are Not Included in the Record of this Proceeding.**

Instead of addressing specific concerns raised by the State in its Response, PFS has chosen to prepare a summary table of what it claims to be the State's concerns then responds to those concerns but selectively citing various PFS documents. PFS Response, Exhibit 1. There are two primary concerns with this tactic. First, the factual evidence presented is unreliable because, *inter alia*, it does not have a sponsoring declarant. There is no indication of (a) who prepared the information contained in Exhibit 1; (b) whether the person or persons who prepared Exhibit 1 had the requisite knowledge to access the State's claims; (c) whether the person or persons who prepared Exhibit 1 had access to or knowledge of all relevant PFS documents; and (d) whether the person or persons who prepared Exhibit 1 had the requisite knowledge to ascertain whether the assertion that certain PFS documents respond to the State's claims is accurate.

To be admissible, evidence must be reliable, relevant and material. 10 CFR § 2.743(c). Exhibit 1 presents evidence that it selective and unreliable. Exhibit 1 should, therefore, be stricken from the record.

Second, a number of the documents relied on by PFS in Exhibit 1 have not been introduced into evidence in this proceeding. The Board cannot rule on the substance of the

State's claims unless it has in evidence the documents referred to by PFS. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-580, 11 NRC 227, 229-30 (1980).

PFS cites to various revisions of its Safety Analysis Report ("SAR") in Exhibit 1 as the reference document that respond to the State's claim. The citations to the various revisions and sections of the SAR are not attached to Exhibit 1. Furthermore, PFS chose not to introduce its License Application into the proceeding during the evidentiary hearing held in Salt Lake City in June 2000. Tr. at 1441-42. In Exhibit 1, PFS also cites to correspondence with NRC, commitment letters, an Engineering Services Scope of Work and a letter from J. Cooper to J. Parkyn, but once again these documents are not attached to Exhibit 1 and have not been introduced into the record.<sup>1</sup> None of the foregoing documents has been introduced into the record in this proceeding. The Board cannot make a substantive ruling on the State's Modification Request of Utah QQ based on the documents cited by PFS because adjudicatory decisions of the Board "stand or fall on the basis of the record on which the rest." Diablo Canyon, 11 NRC at 230. These documents have not been introduced into the record and should be stricken from PFS's Response to State's 2nd Request to Modify Utah QQ.

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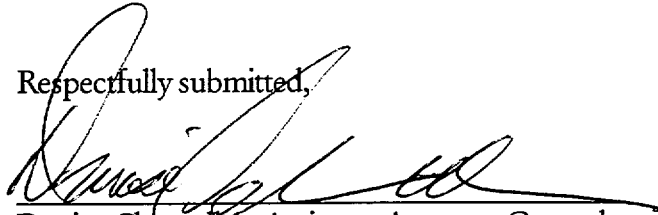
<sup>1</sup> While the calculations cited to in Exhibit 1 appear to be included as exhibits to Mr. Trudeau's Declaration, the State objects to Exhibit 1 for the reasons stated is the State's discussion of PFS's failure to provide a sponsoring declarant for Exhibit 1.

CONCLUSION

For the reasons stated above, the State requests the Board to strike Exhibit 1 to PFS's Response to State's 2nd Request to Modify Utah QQ.

DATED this 12<sup>th</sup> day of September, 2001.

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S MOTION TO STRIKE EXHIBIT 1 TO APPLICANT'S RESPONSE TO STATE OF UTAH'S SECOND REQUEST TO MODIFY THE BASES OF LATE-FILED CONTENTION UTAH QQ was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 12<sup>th</sup> of September, 2001:

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, LLP  
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.  
David W. Tufts  
Durham Jones & Pinegar  
111 East Broadway, Suite 900  
Salt Lake City, Utah 84111  
E-Mail: dtufts@djplaw.com

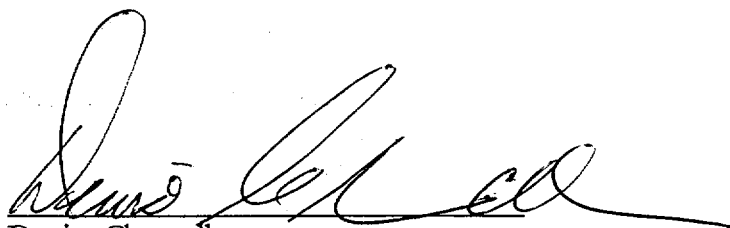
Joro Walker, Esq.  
Land and Water Fund of the Rockies  
1473 South 1100 East, Suite F  
Salt Lake City, Utah 84105  
E-Mail: [utah@lawfund.org](mailto:utah@lawfund.org)

Larry EchoHawk  
Paul C. EchoHawk  
Mark A. EchoHawk  
EchoHawk PLLC  
140 North 4<sup>th</sup> Street, Suite 1  
P.O. Box 6119  
Pocatello, Idaho 83205-6119  
E-mail: [paul@echohawk.com](mailto:paul@echohawk.com)

Tim Vollmann  
3301-R Coors Road N.W. # 302  
Albuquerque, NM 87120  
E-mail: [tvollmann@hotmail.com](mailto:tvollmann@hotmail.com)

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

Office of the Commission Appellate  
Adjudication  
Mail Stop: O14-G-15  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555



Denise Chancellor  
Assistant Attorney General  
State of Utah