

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE, LLC	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent	)	
Fuel Storage Installation)	)	

NRC STAFF’S MOTION FOR PROTECTIVE ORDER, AND  
RESPONSE TO “STATE OF UTAH’S AMENDED MOTION TO COMPEL  
NRC STAFF TO RESPOND TO STATE’S TWELFTH SET OF DISCOVERY  
REQUESTS AND TO COMPEL DR. C. ALLIN CORNELL TO ANSWER  
CERTAIN DEPOSITION QUESTIONS (CONTENTION L, PART B)”

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.730(c), 2.740(c) and 2.740(f), the NRC Staff (“Staff”) hereby (a) responds to the “State of Utah’s Amended Motion to Compel NRC Staff to Respond to State’s Twelfth Set of Discovery Requests and to Compel Dr. C. Allin Cornell to Answer Certain Deposition Questions (Contention L, Part B),” dated November 8, 2001 (“Amended Motion”); (b) requests that the Atomic Safety and Licensing Board (“Licensing Board”) issue a Protective Order to protect against the unwarranted disclosure of privileged, pre-decisional information by the Staff and/or Dr. Cornell, concerning the Commission’s generic rulemaking efforts and/or technical documents developed or distributed to NRC Staff employees, contractors, subcontractors, and/or consultants related to the generic rulemaking effort.<sup>1</sup>

As more fully set forth below, the Staff submits that the State has been allowed to question Dr. Cornell, without objection by Staff Counsel, concerning the scope of the Commission’s generic rulemaking effort and Dr. Cornell’s role therein; further, Dr. Cornell has been allowed to testify

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<sup>1</sup> The State filed its Amended Motion to compel further deposition testimony by Dr. Cornell pursuant to the Licensing Board’s “Memorandum and Order (Schedule for Motion to Compel Supplement),” dated November 2, 2001, at 1.

concerning the factual information he received in the course of the rulemaking effort, and about the bases for his expert opinion concerning the PFS exemption request. The Staff submits, however, that further deposition testimony by Dr. Cornell, concerning privileged, pre-decisional information related to the NRC's generic rulemaking efforts, should not be required. Accordingly, the Staff respectfully submits that it is entitled to a protective order, and the State's Amended Motion seeking to compel further deposition testimony by Dr. Cornell should be denied.<sup>2</sup>

#### BACKGROUND

Contention Utah L, Subpart B, challenges the request filed by Private Fuel Storage, L.L.C. ("PFS" or "Applicant"), for an exemption from the requirements in 10 C.F.R. Part 72 pertaining to the seismic design of its proposed independent spent fuel storage installation ("ISFSI"), to allow it to employ a probabilistic seismic hazard analysis ("PSHA") with a 2,000-year return period. See *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, "Memorandum and Order (Requesting Joint Scheduling Report and Delineating Contention Utah L)," slip op. at 2-3 (June 15, 2001); *Id.*, CLI-01-12, 53 NRC 459 (2001).

On September 18, 2001, the State filed its twelfth set of discovery requests directed to the Staff, in which it set forth numerous requests for admission and document requests, relating to Contention Utah L, Subpart B.<sup>3</sup> As pertinent here, the State's Twelfth Request included numerous requests for admission and document requests that sought to discover information pertaining to the NRC's ongoing efforts to revise the regulations in 10 C.F.R. Part 72, to allow ISFSI applicants to rely upon a probabilistic seismic hazard analysis ("PSHA") in establishing the seismic design

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<sup>2</sup> To the extent necessary, the Staff herein incorporates its response to the State's initial motion to compel. See "NRC Staff's Motion for Protective Order, and Response to 'State of Utah's Motion to Compel NRC Staff to Respond to State's Twelfth Set of Discovery Requests (Contention L, Part B)," dated October 22, 2001 ("Staff Motion").

<sup>3</sup> See "State of Utah's Twelfth Set of Discovery Requests Directed to the NRC Staff" ("Twelfth Request"), dated September 18, 2001.

basis for their facilities (see Requests for Admission Nos. 5-13 and 15-18; and Document Requests 1- 2, 5-13, and 15). On October 3, 2001, the Staff filed its responses and objections to the State's Twelfth Request,<sup>4</sup> which it later supplemented with the production or identification of documents.<sup>5</sup>

On October 31 - November 1, 2001, the State took the deposition of Dr. C. Allin Cornell -- an individual who has been named as an expert witness in this proceeding by PFS,<sup>6</sup> and who also served as a member of an expert panel assembled by NRC contractor ICF Incorporated ("ICF") in connection with the NRC's Part 72 generic rulemaking effort. In its deposition of Dr. Cornell, the State sought *inter alia*, to discover privileged, pre-decisional information that was provided to or by Dr. Cornell in his role as a member of the ICF expert panel in the rulemaking effort.<sup>7</sup>

In the course of Dr. Cornell's deposition, the State asked a series of questions seeking to discover Dr. Cornell's role in the generic rulemaking effort, and whether Dr. Cornell considered any

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<sup>4</sup> See "NRC Staff's Objections and Responses to the 'State of Utah's Twelfth Set of Discovery Requests Directed to the NRC Staff' ("Twelfth Response"), dated October 3, 2001.

<sup>5</sup> See letters from Sherwin E. Turk, Esq., to Denise Chancellor, Esq., dated October 5 and 17, 2001 (identifying, *inter alia*, a list of documents related to the generic rulemaking effort, which were withheld under a claim of privilege).

<sup>6</sup> See "Applicant's Third Supplemental Response to the State's First Requests for Discovery," dated December 10, 1999, at 6-7; and "Applicant's Eighth Supplemental Response to the State's First Requests for Discovery," dated October 2, 2001, at 2-3.

<sup>7</sup> The State recently filed two additional discovery requests seeking to discover information concerning Dr. Cornell's role in the rulemaking effort and information that was developed or exchanged by the Staff, its contractors and subcontractors in the rulemaking effort. See "State of Utah's Thirteenth Set of Discovery Requests Directed to the NRC Staff," dated November 1, 2001 ("Thirteenth Request"), and "State of Utah's Fourteenth Set of Discovery Requests Directed to the NRC Staff," dated November 5, 2001 ("Fourteenth Request"). The Staff responded to these discovery requests on November 16, 2001. See (1) "NRC Staff's Objections and Responses to the 'State of Utah's Thirteenth Set of Discovery Requests Directed to the NRC Staff' ("Thirteenth Response"), and (2) "NRC Staff's Objections and Responses to the 'State of Utah's Fourteenth Set of Discovery Requests Directed to the NRC Staff' ("Fourteenth Response"), filed on November 16, 2001. These responses provided detailed information concerning Dr. Cornell's role in the rulemaking effort and the basis for the Staff's assertion that information exchanged in the rulemaking effort constitutes privileged, pre-decisional information. See Fourteenth Response, at 13-17. The Staff also produced a log of documents that are being withheld under a claim of privilege. See Thirteenth Response (attachment, part B).

information that he received in the rulemaking effort, in formulating his opinion of the PFS exemption request (and, if so, what information did he consider);<sup>8</sup> however, the State went further, and repeatedly sought to discover details about the information and opinions that were exchanged by the Staff and its contractors and subcontractors in the generic rulemaking effort. The Staff did not object to questions concerning Dr. Cornell's role in the process, and generally did not object to (and indeed, pursued) questions concerning the information he relied upon in formulating his opinion of the PFS exemption request.<sup>9</sup> However, the Staff did object to the State's numerous questions seeking to discover privileged, pre-decisional information contained in communications between the Staff, its contractor, and/or subcontractors as part of the generic rulemaking efforts, that were not shown to be connected to Dr. Cornell's expert opinions in this proceeding.

As set forth below, the State's effort to discover information related to the Commission's generic rulemaking efforts in its deposition of Dr. Cornell improperly seeks to discover privileged, pre-decisional information that is exempt from disclosure under the Freedom of Information Act, as set forth in 10 C.F.R. § 2.790 (a)(5) and the Commission's rules governing discovery. Accordingly, its Amended Motion to compel further deposition testimony should be denied.

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<sup>8</sup> Dr. Cornell testified that, in formulating his opinion of the PFS exemption request, he considered publicly available information that he obtained in the rulemaking effort, such as the size and proportions of typical storage casks, the types of calculations required under the Standard Review Plan for casks and canisters, the types of activities conducted in an ISFSI canister transfer building, the differences between nuclear power plant and ISFSI components, and the nature of the calculations required under the Standard Review Plan ("SRP"); in addition, he testified that he relied upon other experts' description of the types of analyses that are typically performed in order to satisfy the Standard Review Plan, and the level of accelerations that are typically identified in cask drop analysis calculations. See Dep. Tr. at 32-33, 69-70, and 75-76. The State could have posed further questions concerning this testimony, but failed to do so. See *id.* at 71-78.

<sup>9</sup> Further, the Staff indicated that it would not object to questions concerning Dr. Cornell's opinion of the Rulemaking Plans published in SECY-98-126 and SECY-01-0178.

DISCUSSION

A. Legal Standards Governing Discovery From the Staff.

It is well established that discovery against the Staff stands on a different footing than discovery against other parties. See, e.g., *Pennsylvania Power and Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 323 (1980); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 NRC 85, 100 n.4 (2000) (in a Subpart K proceeding, “any attempt to obtain discovery materials or testimony from ACRS members, staff, or consultants is subject to the exceptional circumstances showing of 10 C.F.R. § 2.720(h)”).

Discovery against the Staff is governed by the provisions of 10 C.F.R. §§ 2.720(h)(ii)-(iii), 2.744 and 2.790.<sup>10</sup> These regulations establish certain limits to the Staff's obligation to respond to discovery requests. The Presiding Officer may require the Staff to answer interrogatories if it finds “the interrogatories are necessary to a proper decision in the proceeding and that answers to the interrogatories are not reasonably obtainable from any other source.” 10 C.F.R. § 2.720(h)(2)(ii). Similarly, the Presiding Officer may compel the Staff to produce documents, upon a showing that “the document is relevant to the issues in the proceeding; and the document is not exempt from disclosure under 10 C.F.R. § 2.790 -- or, if exempt, that the document or information is necessary to a proper decision in the proceeding and is not reasonably obtainable from another source.” 10 C.F.R. §§ 2.744(c)-(d).

The Freedom of Information Act protects against disclosure of pre-decisional governmental information, documents and communications, under the “executive” or “deliberative process” privilege; this privilege is incorporated in the Commission’s regulations, in 10 C.F.R. § 2.790(a)(5). See, e.g., *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC

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<sup>10</sup> See also 10 C.F.R. §§ 2.740(f)(3), 2.740a(j), 2.740b(a), and 2.741(e) (excluding interrogatories, depositions, and requests for documents or testimony from the Staff from the general provisions of those regulations).

1333, 1341 (1984). The privilege protects from discovery information and documents “reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Id.* The privilege applies to “policymaking” issues as well as to “the deliberative process that precedes most decisions of government agencies.” *Id.* It is well established that this privilege may be invoked in NRC adjudicatory proceedings. *Id.* Further, the privilege extends to include outside consultants, contractors and subcontractors who are involved in the governmental deliberations. *Id.* at 1346. The privilege is qualified, and can be overcome by an appropriate showing of need. *Id.* at 1341. However, once the privilege is properly invoked, the party requesting the disclosure of information protected by the privilege “has the burden of showing that there is an overriding need for its release.” *Id.*<sup>11</sup>

B. The State’s Amended Motion to Compel

In its Amended Motion, the State asserts that Dr. Cornell should be compelled to provide further deposition testimony concerning discussions which took place in a meeting and two conference calls in which he participated, in his role as a member of the ICF panel of experts concerning the Commission’s ongoing generic rulemaking effort. The State frames the issue raised by its Amended Motion as follows:

The issue presented by this part of the State’s motion is whether a testifying expert for a license applicant shall be required to disclose in deposition information given him by the NRC Staff, NRC contractors, or consultants to NRC Staff or NRC contractors (hereinafter collectively referred to as “NRC Staff”) that he considered in formulating his expert opinion, when the Staff claims the information is not relevant or is pre-decisional and, therefore, privileged from disclosure under the deliberative process privilege. See 10 CFR 2.790(a)(5).

Amended Motion at 2.

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<sup>11</sup> Purely factual material must be segregated and released, unless it is “inextricably intertwined” with privileged communications, or if the disclosure of such factual material “would reveal the agency’s decisionmaking process.” *Shoreham, supra*, 19 NRC at 1342.

The Staff submits that the State's description of the issue raised by its Amended Motion is incorrect. Rather, the State has already examined Dr. Cornell as to the type of information he obtained in the rulemaking effort that he considered in formulating his expert opinion of the PFS exemption request. Accordingly, the Staff submits that the issue posed for consideration by the Licensing Board in ruling upon the State's Amended Motion is more correctly stated as follows:

Whether an expert witness for a license applicant concerning the merits of its application should be compelled to disclose information he received from the NRC Staff or NRC contractors, subcontractors, or consultants (collectively referred to as "NRC Staff"), in his former role as an expert retained by an NRC contractor on matters related to a generic rulemaking effort, where that information has not been shown to have been considered by the witness in formulating his expert opinion of the application, and the Staff demonstrates that the information constitutes pre-decisional material that is protected from disclosure under the deliberative process privilege. See 10 C.F.R. § 2.790(a)(5).

In its Amended Motion, the State argues that (a) purely factual material is not privileged and must be disclosed (*Id.* at 7); (b) information that would otherwise be shielded by the deliberative process privilege must be disclosed if it is necessary to a proper decision in the proceeding (*Id.* at 7-10), and (c) the Staff has not shown that the information given to Dr. Cornell is subject to the deliberative process privilege (*Id.* at 10-11). These assertions do not support the Amended Motion.

First, the Staff's answers to the State's Fourteenth Discovery Request demonstrate that the information sought by the State constitutes pre-decisional material that is protected from disclosure under the deliberative process privilege. As discussed above, the Staff did not object to the State's deposition questions concerning Dr. Cornell's role in the NRC rulemaking effort, or the type of information received by Dr. Cornell that he considered in formulating his opinion of the PFS exemption request. Rather, the Staff objected to questions concerning the substance of communications received or made by Dr. Cornell concerning the NRC's rulemaking efforts, which were not shown to be connected to the formulation of his opinion concerning the PFS exemption request. For example, the State's Amended Motion recites certain questions to which the Staff

objected, that were unrelated to the bases for Dr. Cornell's opinion of the PFS exemption request, but rather sought to discover "what influenced the rulemaking plan," and "what did you discuss at the meeting [with NRC Staff on the Modified Rulemaking Plan]?" See Amended Motion at 5-6, citing Dep. Tr. at 11-12 and 14; emphasis added).<sup>12</sup>

In this regard, the Staff's Fourteenth Response describes ICF's role as a contractor to the Staff, and Dr. Cornell's role (under a subcontract with ICF) as a member of an expert panel assembled by ICF to assist in developing technical bases and analyses in the NRC rulemaking effort; it further identifies the period of his subcontract,<sup>13</sup> and the dates of the meeting and telephone conference calls in which he participated. In addition, it recites various provisions in his subcontract which explicitly require, *inter alia*, that "all information developed or disclosed" under the subcontract is to be treated as "Proprietary and Confidential Information"; and that such information (other than "information which is generally available to the public") is not to be disclosed to any other person (except as necessary for the performance of services under the subcontract) without the prior written consent of the contractor (ICF) or as required by law or court order (Fourteenth Response at 13-16). Further, it states that the Staff did not authorize Dr. Cornell to disclose privileged information, and there is no record of any written authorization to do so. *Id.* at 17.<sup>14</sup>

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<sup>12</sup> The Staff does not disagree with the general principle asserted by the State, that a party should be allowed to discover the "basis and reasons" supporting "any expert opinion which another party intends to introduce as evidence" (Amended Motion at 9). Indeed, as stated above, the Staff did not object to the State's questions as to the basis for Dr. Cornell's opinions, but generally objected only to the State's effort to discover, instead, privileged information concerning the NRC generic rulemaking effort that the State did not connect to the bases for his testimony.

<sup>13</sup> The Staff stated that the subcontract between ICF and Dr. Cornell, dated October 1, 1999, specified a period of performance of October 1, 1999, to March 30, 2000, and that Dr. Cornell executed the subcontract with ICF on October 23, 1999 (Fourteenth Response at 14).

<sup>14</sup> There is thus no basis for the State's argument that "[i]f Dr. Cornell was given information as a consultant to NRC, and was not placed under any restrictions on using that information, then whatever privilege may have attached to the information was waived at the time it was shared with Dr. Cornell" (Amended Motion at 10-11). Further, inasmuch as no written authorization was  
(continued...)



Second, the State has failed to sustain its burden of showing that “there is an overriding need” for the release of the privileged information, or that the requested information is necessary to a proper decision in the proceeding. See, e.g., *Shoreham, supra*, 19 NRC at 1341; 10 C.F.R. § 2.720(h)(2)(i)-(iii). On the contrary, the State has been able to inquire as to the bases for Dr. Cornell’s opinion of the PFS exemption request -- in response to which he testified that the information he received in the rulemaking effort that he relied upon in formulating his opinion of the PFS exemption request consisted of publicly available information -- and the Staff did not object to his identification of this information. To the extent that the State seeks to discover information developed or exchanged in the rulemaking effort that was not relied upon by Dr. Cornell in formulating his opinion of the PFS exemption request -- which is the primary focus of its initial Motion to Compel as well as much of the State’s deposition questioning of Dr. Cornell -- it has failed to show that such information is necessary to a proper decision in this proceeding.<sup>15</sup>

As stated in the Staff’s motion for a protective order, filed on October 22, 2001, the central issue to be decided in Contention Utah L, Subpart B, is whether a sound basis exists for the Commission to approve PFS’s request for an exemption from the existing seismic regulations in Part 72. That determination may require examination of the merits of the exemption request --and, under the terms of the contention, may allow the State to compare the PFS exemption request to the approach described in SECY-98-126. However, the litigation of this contention does not require an examination of the information exchanged and opinions expressed in the generic rulemaking

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<sup>14</sup>(...continued)  
provided to Dr. Cornell, there is no basis for the State’s assertion that any disclosure of privileged information by Dr. Cornell to PFS constitutes a waiver of the privilege (*Id.* at 11).

<sup>15</sup> The Staff notes that it has produced both the Rulemaking Plan (SECY-98-126) and the Modified Rulemaking Plan (SECY-01-0178). Accordingly, the State is now aware of the approach proposed in those documents, and the production of other information (developed or exchanged in the course of the development of these documents or otherwise in the NRC’s rulemaking efforts) is not necessary to a proper decision in this proceeding.

proceeding, particularly where the State has not shown that the information it seeks was relied upon by Dr. Cornell in this proceeding.<sup>16</sup>

Finally, the Staff does not disagree with the State's assertion that "purely factual information . . . that does not reveal the deliberative process is not shielded by the deliberative process privilege" (Amended Motion at 7, *citing Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2)*, CLI-94-5, 39 NRC 190, 198 (1994)).<sup>17</sup> Here, however, the State has been allowed to question Dr. Cornell as to the factual information he relied upon in formulating his opinion of the PFS exemption request. The State has failed to show that further deposition testimony concerning these matters is necessary to a proper decision in this proceeding.

#### CONCLUSION

For the reasons set forth above, the Staff respectfully submits that its motion for a Protective Order should be granted, and the State's Amended Motion should be denied.

Respectfully submitted,

**/RA/**

Sherwin E. Turk  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 16th day of November 2001

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<sup>16</sup> In its initial Motion to Compel, the State claimed that it has been placed "at an unfair disadvantage because, based on information and belief, one of PFS's named expert witnesses has had direct involvement in the review and/or development of changes to the rulemaking plan" (Motion at 5); this may be contrasted with the State's claim in the Amended Motion that it seeks to discover the bases for Dr. Cornell's opinions in this proceeding.

<sup>17</sup> In this regard, the *Vogtle* decision recognizes that such "if facts are 'inextricably intertwined' with . . . opinion . . . or otherwise would reveal the deliberative process of the agency, the facts may be exempt from disclosure." *Id.*, 39 NRC at 198.

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

I hereby certify that copies of "NRC STAFF'S MOTION FOR PROTECTIVE ORDER, AND RESPONSE TO 'STATE OF UTAH'S AMENDED MOTION TO COMPEL NRC STAFF TO RESPOND TO STATE'S TWELFTH SET OF DISCOVERY REQUESTS AND TO COMPEL DR. C. ALLIN CORNELL TO ANSWER CERTAIN DEPOSITION QUESTIONS (CONTENTION L, PART B)'" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 16th day of November, 2001:

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