

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 OBJECTIONS AND RESPONSES
 TO THE "STATE OF UTAH'S THIRTEENTH SET OF
DISCOVERY REQUESTS DIRECTED TO THE NRC STAFF"

INTRODUCTION

On November 1, 2001, the State of Utah ("State") filed the "State of Utah's Thirteenth Set of Discovery Requests Directed to the NRC Staff" ("Thirteenth Request"), concerning the application for an Independent Spent Fuel Storage Installation ("ISFSI") filed by Private Fuel Storage, L.L.C. ("PFS" or "Applicant"). In its Request, the State filed 3 document requests concerning Contention Utah L, Part B (seismic exemption). The NRC Staff ("Staff") hereby files its objections and responses to the State's Thirteenth Request, as follows.

GENERAL OBJECTIONS

Objection 1. The Staff objects to each of the State's discovery requests, in that the State has not complied with the Commission's regulations that govern discovery from the Staff. In this regard, it is well established that discovery against the Staff rests on a different footing than discovery in general. *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96, 97-98 (1981). While discovery from parties in an NRC adjudicatory proceeding is generally governed by the provisions of 10 C.F.R. § 2.740 *et seq.*, interrogatory and document discovery

against the Staff is governed by the provisions of 10 C.F.R. §§ 2.720(h)(ii)-(iii), 2.744 and 2.790.¹

These regulations establish certain limits to the Staff's obligation to respond to discovery requests.

In particular, with regard to requests for the production of documents, the Commission's rules provide:

(a) A request for the production of an NRC record or document not available pursuant to 10 C.F.R. § 2.790 . . . shall set forth the records or documents requested, either by individual item or by category, and shall describe each item or category with reasonable particularity and shall state why that record or document is relevant to the proceeding.

(b) If the Executive Director for Operations objects to producing a requested record or document on the ground that (1) it is not relevant or (2) it is exempted from disclosure under § 2.790 and the disclosure is not necessary to a proper decision in the proceeding or the document or the information therein is reasonably obtainable from another source, he shall so advise the requesting party.

10 C.F.R. § 2.744(b).²

Moreover, it is an adequate response to *any* discovery request for a party to state that the information or document requested is available in the public domain and to provide information to locate the material requested. 10 C.F.R. § 2.740(b)(1); *accord*, *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 147-148 (1979).

Here, the State has not complied with the Commission's requirements governing discovery against the Staff. First, the State has not indicated that the requested documents and information

¹ See *also* 10 C.F.R. §§ 2.740(f)(3), 2.740a(j), 2.740b(a), and 2.741(e) (excluding discovery from the Staff from the general provisions of those regulations).

² The rule further provides for application by the requesting party to the presiding officer to compel production of the documents, where the movant shows 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). Additionally, 10 C.F.R. § 2.744(e) provides a framework for limited disclosure (under a protective order) of documents exempt from disclosure under 10 C.F.R. § 2.790, upon a finding by the presiding officer that such disclosure is necessary to a proper decision in the proceeding. *Cf.* 10 C.F.R. § 2.740(c).

are not available in the public domain. Indeed, some of the documents requested by the State are available to the public in the Commission's Public Document Room ("PDR"), or have previously been provided to the State. Further, the State has not indicated that the requested information and documents are exempt from disclosure under 10 C.F.R. § 2.790 or that it can not obtain the documents from public sources. Similarly, to the extent that any documents may be exempt from disclosure, such as the documents requested by the State concerning the NRC's rulemaking process and the development of a rulemaking approach, the State has not explained why any such exempt items are necessary to a proper decision in the proceeding.³

Objection 2. The Staff objects to each of the State's discovery requests, insofar as they request information that is not relevant to the issues in this proceeding and/or that exceeds the scope of admitted contention Utah L, Part B (seismic exemption) in this proceeding.

Objection 3. The Staff objects to the State's discovery requests insofar as they relate to matters which are outside the jurisdiction of the NRC and/or are beyond the proper scope of this proceeding.

Objection 4. The Staff objects to each of the State's discovery requests, insofar as they seek to impose an obligation to respond that is different from or greater than the obligations imposed by Commission requirements in 10 C.F.R. Part 2. See, e.g., "Instruction B" ("Supplemental Responses") (Request at 2).

Objection 5. The Staff objects to each of the State's discovery requests, insofar as they may request information or documents from the "Nuclear Regulatory Commission," "NRC," or other persons or entities who are not NRC Staff members or consultants in this proceeding. See, e.g., "Definition A" (Request at 3). The NRC and persons other than Staff members (e.g.,

³ In addition, to the extent that the instant discovery requests seek information that has been withheld from public disclosure as PFS' proprietary information, the State has been afforded access to that material by the Applicant under a confidentiality agreement, and the State has shown no reason why it could not obtain the requested information from the Applicant.

Commissioners, Commissioners' Assistants, Licensing Board members, ACRS members, etc.) are not parties to this proceeding and are not properly subject to the State's requests for discovery in this proceeding.

Objection 6. The Staff objects to each of the State's discovery requests, insofar as they request personal information such as the home address and telephone numbers of persons employed by or affiliated with the Staff, and which may be protected from disclosure under 10 C.F.R. § 2.790(a) .

Objection 7. The Staff objects to each of the State's discovery requests, insofar as they may request intra-agency memoranda, notes and other pre-decisional materials; or information or documents protected under the attorney-client privilege, the doctrines governing the disclosure of attorney work product and trial preparation materials, and/or any other privilege or exemption that warrants or permits the non-disclosure of documents under the Freedom of Information Act, as set forth in 10 C.F.R. § 2.790(a). Notwithstanding this objection, the Staff states that it will prepare a privilege log to identify documents that are sought to be withheld from discovery as privileged or exempt from disclosure, and will produce that log to the State.

Objection 8. The Staff objects to each of the State's discovery requests, insofar as they request information concerning the NRC's internal rulemaking process and the development of a generic Part 72 seismic rulemaking approach, which matters are not relevant to the issues in this proceeding and/or exceed the scope of admitted contention Utah L, Part B (seismic stability); further, the State has not explained why any such exempt items are necessary to a proper decision in the proceeding.

Objection 9. The Staff objects to each of the State's discovery requests, insofar as they may pertain to Contention Utah L, Part A (geotechnical), which is an issue that has previously been the subject of discovery and is not currently subject to discovery under the Licensing Board's scheduling orders in this proceeding. See, e.g., "Attachment A" to "Order (General Schedule

Revisions),” dated September 20, 2001 (discovery against the Staff on Contention Utah L, Part A, has been completed, except as to new matters for which discovery commences January 2, 2002).

RESPONSES TO DOCUMENT REQUESTS

In addition to the objections stated above, the Staff hereby states the following additional objections and responses to the State’s Thirteenth Request. Notwithstanding these objections, and without waiving these objections or its right to interpose these or other objections in the future, the Staff states as follows.

CONTENTION UTAH L, PART B - Geotechnical

DOCUMENT REQUEST NO. 1. All documents relating or referring to any NRC Staff analysis or study of cask stability at the PFS site, including any documents related to the Staff’s evaluation of the potential for cask tipover at the PFS site as referenced in Supplemental Response to State of Utah’s Sixth Set of Discovery Requests Directed to the NRC Staff, Request for Admission No. 16 (Utah Contention L) (July 12, 2000).

STAFF RESPONSE. The Staff objects to this Request on the grounds that it (1) is vague and ambiguous, insofar as it refers to “any NRC Staff analysis or study of cask stability at the PFS site;” (2) constitutes an improper compound question; (3) is overly broad and burdensome, in that it lacks any limitation on the time period or other specific parameters; (4) seeks to discover draft, predecisional or privileged information that is exempt from disclosure under 10 C.F.R. § 2.790; (5) seeks to discover information that is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence in this proceeding; and (6) the State has not demonstrated that the information requested could not have been obtained from another source, including, without limitation, the Staff’s Safety Evaluation Report for the PFS Facility issued in September 2000. Notwithstanding these objections, documents will be produced to the extent that such documents (a) are not objected to, (b) are not otherwise available from other sources, and (c) are not draft,

predecisional and/or privileged documents that are exempt from disclosure under 10 C.F.R. § 2.790, in which case they will be identified in a privilege log.⁴

DOCUMENT REQUEST NO. 2. All documents relating or referring to any PFS analysis or study of cask stability at the PFS site considered or relied upon by the Staff in the course of its evaluation of the potential for cask tipover at the PFS site as referenced in Supplemental Response to State of Utah's Sixth Set of Discovery Requests Directed to the NRC Staff, Request for Admission No. 16 (Utah Contention L) (July 12, 2000).

STAFF RESPONSE. See Response to Document Request No. 1, *supra*. In addition to the objections stated therein, which are incorporated by reference in response to this Request, the Staff objects to this Request on the ground that the State has not demonstrated that the documents requested could not have been obtained from another source, including, without limitation, PFS and files located in the Commission's PDR. See 10 C.F.R. § 2.740(b)(1).

DOCUMENT REQUEST NO. 3. All handouts, slides, presentation materials, or other documents distributed to consultants to ICF, including all handouts, slides, presentation materials, or other documents distributed at or in preparation for a March 2000 meeting to discuss ICF's technical support to NRC staff's development of a regulatory guide on the preparation of a probabilistic seismic hazard analysis for ISFSIs.

STAFF RESPONSE. The Staff objects to this Request on the grounds that it (1) is vague and ambiguous, in its use of the term "consultants to ICF," (2) seeks to discover draft, predecisional or privileged information that is exempt from disclosure under 10 C.F.R. § 2.790, and (3) seeks to

⁴ Attached hereto is a list of documents in the possession of the Staff which may be responsive to one or more of the document requests contained in the State's Thirteenth Request. These documents consist of two groups: (a) documents that appear to be available in the public docket, and (b) documents that are being withheld as privileged or otherwise exempt from disclosure under 10 C.F.R. § 2.790. Documents relating to Utah Contention L, Part B that have previously been produced by the Staff, or that are in the docket of the PFS proceeding (including legal correspondence, pleadings, Orders, license application submittals, and licensing-related correspondence), are not identified herein. Those materials should already be in the State's possession, as a result of the State's participation as a party in the PFS proceeding and its inclusion on the PFS and Staff service lists.

discover information that is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence in this proceeding. Notwithstanding these objections, documents will be produced to the extent that such documents (a) are not objected to, (b) are not otherwise available from other sources, and (c) are not draft, predecisional and/or privileged documents that are exempt from disclosure under 10 C.F.R. § 2.790, in which case they will be identified in a privilege log.

Respectfully submitted,

/RA/

Martin J. O'Neill
Sherwin E. Turk
Counsel for NRC Staff

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

**NRC STAFF DOCUMENTS
IDENTIFIED IN RESPONSE TO THE
STATE OF UTAH'S DOCUMENT REQUESTS
CONCERNING UTAH CONTENTION L, PART B (SEISMIC EXEMPTION)¹**

A. Publicly Available Documents

<u>Date</u>	<u>Author</u>	<u>Recipients²</u>	<u>Subject</u>
--	DOE	Various	DOE-STD-1020 (latest version as of 1/00)
12/96	NRC	Various	NUREG-1571
2/96	NRC	Various	NUREG/CR 6407
4/8/98	NRC	Various	SECY-98-071
6/4/98	NRC	Various	SECY-98-126

¹Organizations or other entities are abbreviated herein as follows: NRC Staff - "NRC"; ICF Incorporated - "ICF" (NRC contractor); Science Applications International Corporation - "SAIC" (an ICF subcontractor); U.S. Department of Energy - "DOE"; Center for Nuclear Waste Regulatory Analyses (an NRC contractor) - "CNWRA"; "Expert Panel" - "EP."

² The term "various," when used herein in conjunction with "recipients," refers to some combination of NRC staff members, NRC contractors and/or consultants, and expert panel members.

B. Documents Withheld Under a Claim of Privilege.³

<u>Date</u>	<u>Author</u>	<u>Recipient</u>	<u>Subject</u>	<u>Privilege Asserted</u>
11/3/99	C. Stepp	B. Tripathi (SAIC) cc: various	E-mail - "Subject: Teleconference - Kickoff Meeting NRC 10 CFR 72 Rulemaking for ISFSI"	PD
11/4/99	B. Tripathi	Various	E-mail - "Subject: Teleconference -NRC/ICF/ SAIC Kickoff Meeting Part 72 Rulemaking for ISFSI"	PD
11/4/99	B. Tripathi	Various	E-mail - "NRC Part 72 Rulemaking - Teleconference 11-10-99"	PD
11/8/99	B. Tripathi	Various	E-mail - "Subject: Tentative Agenda for Teleconference 11-10-99 at 11:15am EST"	PD
11/10/99	R. Kennedy (EP member)	Various	E-mail - "Subject: Tentative Agenda for Teleconference 11-10-99 at 11:15am EST"	PD
11/12/99	B. Tripathi	Various	E-mail - "Subject: NRC Part 72 Rulemaking EP List, NPP/SSE List, ISFSI List," with attachments (3)	PD
11/12/99	J. Kimball (DOE)	B. Tripathi cc: various	E-mail - "Subject: NRC Part 72 Rulemaking"	PD
11/12/99	R. McGuire	B. Tripathi cc: various	E-mail - "Subject: Information for Panel Meeting"	PD
11/16/99	B. Tripathi	Various	E-mail - "Subject: NRC Part 72 Rulemaking - ISFSI Design Details," with attachment	PD

³ The following abbreviations are used herein: AC - attorney-client privilege; AWP - attorney work product; PD - predecisional deliberative process.

<u>Date</u>	<u>Author</u>	<u>Recipient</u>	<u>Subject</u>	<u>Privilege Asserted</u>
11/22/99	B. Tripathi	D. Hammer (ICF) cc: various	E-mail - "Subject: NRC Part 72 Rulemaking"	PD
12/22/99	D. Hammer	B. Tripathi cc: various	E-mail - "Subject: Task Order 17 - Status Update"	PD
1/13/00	B. Tripathi	Various	E-mail - "Subject: NRC 10 CFR 72 Rulemaking - Project Status And Recent Developments"	PD
1/13/00	B. Tripathi	D. Hammer	E-mail - "Subject: List of Core Reference Documents to be Sent to EP as soon as Possible"	PD
2/15/00	B. Tripathi	Various	Draft document - "Technical Justifications in Support of Recommendations (White Paper)," prepared by B. Tripathi	PD
2/16/00	B. Tripathi	Various	E-mail - "Subject: Sample Deliverables for NRC Part 72 Teleconference," with attachments (2)	PD
2/21/00	R. Kennedy	B. Tripathi	E-mail - "Subject: NRC Part 72 Rulemaking," with attachment (1)	PD
2/22/00	J. Kimball	B. Tripathi cc: various	E-mail - "Subject: NRC Part 72 Rulemaking," with attachment	PD
3/13/00	D. Hammer	Various	E-mail - "Subject: Project Meeting - Part 72 Rulemaking," with	PD
3/14/00	D. Hammer	EP B. Tripathi	E-mail - "Subject: Memorandum," with attachment (regarding upcoming 3/16/00 meeting)	PD

<u>Date</u>	<u>Author</u>	<u>Recipient</u>	<u>Subject</u>	<u>Privilege Asserted</u>
3/22/00	D. Hammer	Various	E-mail - "Subject: Meeting Notes," with attachment (3/16/00 meeting)	PD
3/28/00	D. Hammer	Various	E-mail - "Subject: Project Status," with attachment	PD
3/31/00	D. Hammer	Various	E-mail - "Subject: Technical Basis for Using Graded Approach," with attachment	PD
4/3/00	D. Hammer	Various	E-mail - "Subject: Draft Regulatory Guide (Strawman)," with attachment	PD
4/5/00	D. Hammer	Various	E-mail - "Subject: Additional Information for Reg. Guide," with attachment	PD
4/18/00	D. Hammer	K. McDaniel (NRC) cc: various	E-mail - "Subject: Part 72 Seismic"	PD
6/13/00	D. Hammer	K. McDaniel cc: various	E-mail - "Subject: Comments SFPO Position Paper," with attachment	PD
6/13/00	D. Hammer	K. McDaniel B. Tripathi	E-mail - "Subject: Draft Regulatory Guide," with attachment	PD
10/23/00	D. Hammer	K. McDaniel cc: various	E-mail - "Subject: Revised Technical Basis Document - Part 72 Rulemaking," with attachment	PD
10/15/01	G. Ofoegbu (CNWRA)	NRC staff/counsel	Slides/notes from presentation: "PFS Facility Safety Evaluation Report - Section 2.1.6.4 Stability of Subsurface Materials"	PD, AC and/or AWP

<u>Date</u>	<u>Author</u>	<u>Recipient</u>	<u>Subject</u>	<u>Privilege Asserted</u>
10/15/01	D. Pomerening A. Chowdhury (CNWRA)	NRC staff/counsel	Slides/notes from presentation: "PFS L.L.C. ISFSI at Skull Valley, Design Criteria and Structural Evaluation"	PD, AC and/or AWP

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PRIVATE FUEL STORAGE L.L.C.) Docket No. 72-22-ISFSI
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Fuel Storage Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S OBJECTIONS AND RESPONSES TO THE 'STATE OF UTAH'S THIRTEENTH SET OF DISCOVERY REQUESTS DIRECTED TO THE NRC STAFF'" 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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