

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO
 "STATE OF UTAH'S MOTION FOR AN OPPORTUNITY TO
 SUPPLEMENT ITS RESPONSE TO APPLICANT'S MOTION FOR
 SUMMARY DISPOSITION OR IN THE ALTERNATIVE MOTION FOR
EXTENSION OF TIME TO RESPOND TO SUMMARY DISPOSITION"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730(c), and the Atomic Safety and Licensing Board's "Memorandum and Order Schedule for Supplementation/Extension Motion Responses)," dated November 14, 2001, the NRC Staff ("Staff") hereby responds to the "State of Utah's Motion for an Opportunity to Supplement Its Response to Applicant's Motion for Summary Disposition or in the Alternative Motion for Extension of Time to Respond to Summary Disposition" ("Motion to Supplement or Defer"), dated November 13, 2001. For the reasons set forth below, the Staff submits that the State of Utah ("State") has failed to demonstrate good cause for the granting of its Motion to Supplement or Defer, and its motion should therefore be denied.

BACKGROUND

Contention Utah L, Part B challenges the request for an exemption from certain seismic requirements in 10 C.F.R. Part 72, filed by Private Fuel Storage, L.L.C. ("PFS" or "Applicant") in connection with its application for a license to construct and operate an independent spent fuel

storage installation (“ISFSI”) on the Reservation of the Skull Valley Band of Goshute Indians.¹ In accordance with the Licensing Board’s scheduling orders, discovery on Contention Utah L, Part B, commenced on September 17, 200.²

As part of the State’s discovery efforts concerning Contention Utah L, Part B, the State filed several sets of discovery requests, and took the oral depositions of persons who had been named as PFS’s expert witnesses. Among these was the deposition of PFS witness Dr. C. Allin Cornell, taken on October 31 - November 1, 2001. In addition to being named as a PFS expert witness, Dr. Cornell previously served as a member of an expert panel assembled by an NRC contractor, providing technical assistance in a generic NRC rulemaking effort concerning changes to 10 C.F.R. Part 72 to allow the use of probabilistic seismic hazard analysis (“PSHA”) in the siting and design of dry cask storage ISFSIs.

In its written discovery directed to the Staff, as well as during the deposition of Dr. Cornell, the State repeatedly sought to discover information concerning the Staff’s ongoing generic rulemaking efforts, and discussions between the Staff and its contractor and subcontractors at a meeting and two conference calls in which Dr. Cornell participated as part of the rulemaking effort. The Staff objected to the State’s written discovery requests concerning these matters,³ as well as to a number of deposition questions, on the grounds that the information constituted pre-decisional material that is exempt from disclosure under the deliberative process or executive privilege. On

¹ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459 (2001); *Id.*, “Memorandum and Order (Requesting Joint Scheduling Report and Delineating Contention Utah L),” dated June 15, 2001 (unpublished). See also, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-03, 53 NRC 84, 101 (2001).

² See “Order (General Schedule Revisions),” dated September 20, 2001; “Memorandum and Order (Revised General Schedule),” dated September 17, 2001.

³ See, e.g., “NRC Staff’s Objections and Responses to the “State of Utah’s Twelfth Set of Discovery Requests Directed to the NRC Staff,” dated October 3, 2001 (Requests for Admission 5-13, and 15-18; Document Requests 1-2, and 5-13).

November 8, 2001, the State filed a motion to compel further deposition testimony by Dr. Cornell concerning these matters, to which the Staff responded on November 16, 2001;⁴ the motion to compel is currently pending before the Licensing Board.

On November 9, 2001, in accordance with the Licensing Board's established schedule, PFS filed a motion seeking summary disposition of Contention Utah L, Part B.⁵ Responses to that motion are due to be filed by the State of Utah and NRC Staff by November 29, 2001, with a reply by the State to be filed by December 10, 2001.⁶

On November 13, 2001, the State filed the instant Motion, in which it seeks permission to supplement its response to the Applicant's Summary Disposition Motion, or in the alternative, to extend the time to respond to that motion, until the Board has ruled upon the State's Amended Motion to Compel (Motion at 3).

DISCUSSION

The State describes its instant request as a "provisional motion," filed to protect the State "in the event the Board rules in favor of the State's Amended Motion to Compel" (*Id.* at 1). Thus, if the Board denies the State's amended motion to compel, no further deposition discovery of

⁴ See (1) "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"); and (2) 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)," dated November 16, 2001 ("Staff Response").

⁵ See "Applicant's Motion for Summary Disposition of Part B of Utah Contention L" ("Summary Disposition Motion"), dated November 9, 2001.

⁶ The Staff notes that in light of the upcoming Thanksgiving holiday, it has discussed with PFS and the State a proposal to modify the dates for filing responses to the Applicant's Summary Disposition Motion, whereby the Staff's and State's responses would be filed by December 7, 2001, and the State's reply to new information in the Staff's response would be filed by December 17, 2001 (an extension of about one week). An unopposed motion seeking such an extension may be filed later this week.

Dr. Cornell would be taken, and there would be no reason to grant the State's instant Motion.

The Staff has previously stated its view, in its Response to the State's initial and amended motions to compel, that (a) the State's attempts to discover additional information concerning the NRC's generic rulemaking efforts improperly seek to compel the production of privileged, pre-decisional information concerning the agency's internal rulemaking process, that is exempt from disclosure under the Freedom of Information Act and the Commission's discovery rules, and (b) the information sought to be discovered by the State is not necessary to a proper decision in this proceeding.⁷

In this regard, the Staff has produced a copy of SECY-01-0178, containing the Staff's proposed modification of the Rulemaking Plan in SECY-98-126 -- thereby disclosing how the Staff proposes to modify the rulemaking plan.⁸ In addition, the Staff recently produced detailed information to the State concerning the scope of the rulemaking effort and Dr. Cornell's role in that process.⁹ Finally, Dr. Cornell has testified that to the extent he relied upon information in formulating his expert opinion in this proceeding which he obtained through the rulemaking process, the information was publicly available -- and the State has already been able to examine

⁷ See, e.g., (1) Staff Response of November 16, 2001, at 6-10; and (2) "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, at 3-7.

⁸ See letter from Sherwin E. Turk, Esq., to Denise Chancellor, Esq., dated October 17, 2001, enclosing SECY-01-0178, "Modified Rulemaking Plan: 10 CFR Part 72 -- 'Geological and Seismological Characteristics for Siting and Design of Dry Cask Independent Spent Fuel Storage Installations,'" dated September 26, 2001.

⁹ See "NRC Staff's Objections and Responses to the 'State of Utah's Fourteenth Set of Discovery Requests Directed to the NRC Staff," dated November 16, 2001, at 13-17; see also, "NRC Staff's Objections and Responses to the State of Utah's Thirteenth Set of Discovery Requests Directed to the NRC Staff," dated November 16, 2001 (producing a list of documents distributed or conveyed to Dr. Cornell, withheld under a claim of privilege).

him on those matters.¹⁰ Thus, no further discovery concerning such matters appears necessary for a proper decision in this proceeding.¹¹ For these reasons, as more fully stated in the Staff's responses to the pending motions to compel, the Staff believes the State's motions to compel further discovery concerning these matters should be denied.

If the Licensing Board determines to deny the State's pending motions to compel (as the Staff believes is appropriate), Dr. Cornell would not be deposed further -- and there would be no need for the State to supplement, or extend the time for filing, its response to the Applicant's motion for summary disposition. In that event, there would be no reason to allow the State to defer or supplement its response to the Applicant's Summary Disposition Motion.

In sum, prior to the issuance of a ruling on the State's pending motions to compel, there is no basis for the State's view that it may need to supplement or extend the filing of its response to the Summary Disposition Motion. Moreover, in the event that the Licensing Board grants the State's amended motion to compel and allows the State to conduct further deposition discovery,

¹⁰ As stated in the Staff's response to the State's amended motion to compel, 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 did not do so. See *id.* at 71-78.

¹¹ The State bases its motion, not only on the claim that Dr. Cornell's opinion in this proceeding may be based upon some information that he received in the rulemaking process (addressed in n.10, *supra*), but also on the claim that "justice would not prevail if the State were precluded from discovering relevant information from PFS's witness and the Staff, especially when that information is available to the State's adversaries" (Motion to Defer or Supplement, at 3). This assertion is without merit; to the extent that Dr. Cornell may have received information in the rulemaking process that he does not rely upon in this proceeding, that information is irrelevant; accordingly, the State's response to summary disposition will not "be disadvantaged because the State has not been given a full and fair opportunity to obtain facts essential to justify its opposition" (*Id.* at 4).

the State could file a motion to supplement its response to the Summary Disposition Motion at that time. Accordingly, the State has not shown good cause for the Board to grant its "provisional" motion to extend the time for filing, or to be allowed to supplement, its response to the Applicant's Summary Disposition Motion.

CONCLUSION

For the reasons set forth above, the Staff submits that the State's Motion to Defer or Supplement should be denied.

Respectfully submitted,

/RA/

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of November 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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 RESPONSE TO 'STATE OF UTAH'S MOTION FOR AN OPPORTUNITY TO SUPPLEMENT ITS RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OR IN THE ALTERNATIVE MOTION FOR EXTENSION OF TIME TO RESPOND TO SUMMARY DISPOSITION,'" 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 19th day of November, 2001:

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