

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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

INTRODUCTION

On December 6, 2001, the State of Utah ("State") filed "State of Utah's Fifteenth Set of Discovery Requests Directed to the NRC Staff" ("Fifteenth 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 10 document requests concerning Contention Utah K/Confederated Tribes B (aircraft crash hazards). The NRC Staff ("Staff") hereby files its objections and responses to the State's Fifteenth Request, as follows.¹

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

¹ The following objections and responses are filed pursuant to an extension of time granted by the Licensing Board, without objection by the State. See "Order (Granting Discovery Response Time Extension Request)," dated December 19, 2001.

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 2.790.² 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).³

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).

² 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).

³ 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). With respect to interrogatories, see 10 C.F.R. § 2.720(h)(2)(ii).

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 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, the State has not explained why any such exempt items are necessary to a proper decision in the proceeding.⁴

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 K, Confederated Tribes B (aircraft crash hazard) 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).

⁴ 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.

Objection 5. 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 has prepared a privilege log to identify documents that are sought to be withheld from discovery as privileged or exempt from disclosure, which has been provided to the State.

Objection 6. The Staff objects to each of the State's discovery requests, insofar as they may pertain to issues that have previously been the subject of discovery and are 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 K, Confederated Tribes B has been completed, except as to new matters raised in the Staff's November 13, 2001, Supplement to the Safety Evaluation Report ("SER"), for which discovery commenced November 21, 2001).

RESPONSES TO DISCOVERY REQUESTS

Notwithstanding the above objections to the State's Fifteenth Request, and without waiving these objections or its right to interpose these or other objections in the future, the Staff hereby states the following additional objections and responses to the State's Request.

DOCUMENT REQUEST NO. 1

All documents that the Staff may rely upon or otherwise use at the hearing set for this matter in April 2002, relating to the calculation of crash rates for F-16 aircraft transiting Skull Valley.

STAFF RESPONSE

Documents that are responsive to this request include the Staff's Safety Evaluation Report related to the Private Fuel Storage Facility ("SER"), issued September 29, 2000; the Staff's Supplement to the SER, dated November 13, 2001; NUREG-0800, the NRC Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants; the Applicant's docketed submittals; the State and Applicant's discovery responses and other filings in this proceeding; various Licensing Board, Atomic Safety and Licensing Appeal Board, and Commission decisions; and the Commission's regulations and regulatory guidance documents. These materials are in the public domain or have been made available to the State due to the State's participation as a party in the PFS proceeding and its inclusion on the PFS and Staff service lists.

Documents responsive to this request have been provided or identified to the State, to the extent that they are not (a) otherwise available from other sources, and (b) are not draft, predecisional and/or privileged documents that are exempt from disclosure under 10 C.F.R. § 2.790, in which case they were identified in a privilege log provided to the State in a letter from Catherine Marco, Esq. to Denise Chancellor, Esq., dated December 28, 2001.

DOCUMENT REQUEST NO. 2

All documents that the Staff may rely upon or otherwise use at the hearing set for this matter in April 2002, relating to the calculation of the probability of crashes at the proposed PFS facility of F-16 aircraft transiting Skull Valley.

STAFF RESPONSE

See Response to Document Request No. 1, *supra*.

DOCUMENT REQUEST NO. 3

All documents that the Staff may rely upon or otherwise use at the hearing set for this matter in April 2002, relating to the calculation of crash rates for ordinance from F-16 aircraft transiting Skull Valley.

STAFF RESPONSE

See Response to Document Request No. 1, *supra*.

DOCUMENT REQUEST NO. 4

All documents that the Staff may rely upon or otherwise use at the hearing set for this matter in April 2002, relating to the calculation of the probability of crashes at the proposed PFS facility from ordinance from F-16 aircraft transiting Skull Valley.

STAFF RESPONSE

See Response to Document Request No. 1, *supra*.

DOCUMENT REQUEST NO. 5

All documents that the Staff may rely upon or otherwise use at the hearing set for this matter in April 2002, relating to the calculation of crash rates due to air to air combat training on the Utah Test and Training Range.

STAFF RESPONSE

See Response to Document Request No. 1, *supra*.

DOCUMENT REQUEST NO. 6

All documents that the Staff may rely upon or otherwise use at the hearing set for this matter in April 2002, relating to the calculation of the probability of crashes at the proposed PFS facility due to air to air combat training on the Utah Test and Training Range.

STAFF RESPONSE

See Response to Document Request No. 1, *supra*.

DOCUMENT REQUEST NO. 7

All notes, memoranda, reports or other documents showing the calculation of any of the crash rates or probabilities of crashes at the proposed PFS facility referred to in the foregoing requests 1 through 6, made by or at the direction of the Staff.

STAFF RESPONSE

See Response to Document Request No. 1, *supra*.

DOCUMENT REQUEST NO. 8

A copy of the most recent pleading or paper filed by the Staff in any proceeding before the ASLB (other than this PFS proceeding) wherein the Staff supported or agreed with the applicant's calculation of the probability of an aircraft crash at the proposed facility.

STAFF RESPONSE.

The Staff objects to this request on the grounds that it (a) is overly vague and ambiguous in its use of the phrase "supported or agreed with the applicant's calculation of the probability of an aircraft crash," and the type or identity of the document(s) requested; (b) is unduly broad and burdensome, in that it lacks any limitation on the time period in which the proceeding may have occurred or other specific parameters, and would require the Staff to sift through the adjudicatory docket for numerous proceedings to identify whether aircraft crash probability was an issue in those proceedings and whether the Staff in those proceedings supported or agreed with an applicant's calculation of the probability of an aircraft crash at the proposed facility; (c) seeks to discover draft, predecisional or privileged information that is exempt from disclosure under 10 C.F.R. § 2.790; (d) 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 (e) the State has not demonstrated that the information requested could not have been obtained from another source, including, without limitation, PFS and the adjudicatory files in the Commission's Public Document Room; further, the State has failed to show any reason why the Staff should be required to perform this task on behalf of the State. See 10 C.F.R. § 2.740(b)(1).

DOCUMENT REQUEST NO. 9

A copy of the most recent pleading or paper filed by the staff in any proceeding before the ASLB (other than this PFS proceeding) wherein the Staff disagreed with or opposed the applicant's calculation of the probability of an aircraft crash at the proposed facility.

STAFF RESPONSE

See Response to Document Request No. 8, *supra*.

DOCUMENT REQUEST NO. 10

Copies of all references, reports or authorities reviewed by the Staff (other than those filed in this PFS proceeding) in connection with preparing the Staff's Revision to the PFS Safety Evaluation Report, Aircraft Supplement No. 1, and References - Supplement No. 1, November 13, 2001, which refer or relate to the probability that a pilot of an aircraft involved in a mishap or crash would be able to avoid a crash of the aircraft at a specific ground facility.

STAFF RESPONSE

The Staff is not aware of any documents that are responsive to this request which were not filed in this proceeding or referred to in Supplement No. 1 to the Staff's SER related to the Private Fuel Storage Facility.

Respectfully submitted,

/RA/

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 2nd day of January 2002

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S OBJECTIONS AND RESPONSES TO THE STATE OF UTAH'S FIFTEENTH 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 2nd day of January, 2002:

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