

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF THE SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	November 13, 2001

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

On November 8, 2001, the State filed an Amended Motion to Compel NRC Staff to Respond to the State's Twelfth Set of Discovery Requests and to Compel Dr. C. Allin Cornell to Answer Certain Deposition Questions (Contention L, Part B) (hereinafter "Amended Motion to Compel"). Staff and PFS responses to the Amended Motion to Compel are due to be filed by November 16, 2001. The State is filing this provisional motion to request certain procedural safeguards in the event the Board rules in favor of the State's Amended Motion to Compel.

On October 31 and November 1, 2001, the State deposed PFS-named witness for Utah L, Part B, Dr. C. Allin Cornell. During the course of the deposition, Staff counsel objected to questions relating to Dr. Cornell's involvement in NRC's development of a rulemaking plan to allow the use of a probabilistic seismic hazard analysis with a 2,000 year return period for evaluating ISFSI sites. Staff counsel claimed the information was pre-decisional, privileged or not relevant. See Amended Motion to Compel at n. 1. In addition,

the Staff generally objected to written discovery relating to the Rulemaking Plan and modifications thereto contained in the State's 12th Set of Discovery to the Staff on the grounds that the information and document requests were pre-decisional, and thus privileged. The October 10, 2000 Motion to Compel NRC Staff to Respond to State's Twelfth Set of Discovery Requests was incorporated into the State's Amended Motion to Compel at 2.

The State has reviewed PFS's November 9, 2001, Motion for Summary Disposition of Part B of Utah Contention L, and finds that the mainstay of the Motion is provided by Dr. Cornell's Declaration in support thereof. In his deposition, Dr. Cornell testified that his participation in the NRC's Modified Rulemaking Plan committee influenced his opinion and, moreover, Dr. Cornell shared certain substantive information obtained during that procedure with PFS. See Amended Motion to Compel at 8. To date, PFS has not produced any information that Dr. Cornell shared with PFS from the rulemaking procedure.

Fairness dictates that the State be given the opportunity to use any and all information obtained from a comprehensive deposition of Dr. Cornell and from written discovery from the Staff in its response to PFS's Motion for Summary Disposition. Therefore, should the Board rule in favor of the State, after the State has filed its Response or Reply to Summary Disposition, the State requests that after continuing Dr. Cornell's deposition and receiving discovery responses and documents from the Staff, it be given the opportunity to supplement its Response and Reply. In the alternative, should the Board rule in favor of the State prior to the time it files its Response to Summary Disposition, the State requests an extension of three working days after completing Dr. Cornell's deposition to file

its Response, with the State's Reply due seven days after filing the State's Response. Neither of these requests should delay the schedule but there is the potential, depending on the date of the Board's ruling on the State's Amended Motion to Compel, that the second request could throw the schedule off by a few days.

The Board has the authority, upon motion and in the interests of justice, to order the sequence and timing of discovery. 10 CFR § 2.740(d). Here, 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. The State's request is also embodied in the NRC rules relating to summary disposition on the pleadings. When an opponent to summary disposition cannot obtain facts essential to justify its opposition, "the presiding officer may ... order a continuance to permit affidavits to be obtained or to make such other order as is appropriate...." 10 CFR § 2.749(c). The State submits that its response to Summary Disposition will be disadvantaged because the State has not been given a full and fair opportunity to obtain facts essential to justify its opposition. Moreover, the State is filing this provisional Motion now in an effort to hold to the current litigation schedule.

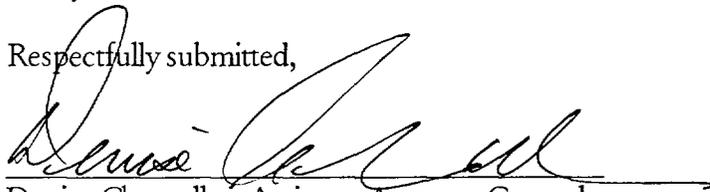
The State has contacted counsel for the Staff and PFS, both of whom object to any request by the State for an extension of time to file its summary disposition response; they will file their specific concerns after reviewing the State's Motion.

CONCLUSION

For the foregoing reasons, the State asks that the Board grant the requested procedural safeguards in the event that the Board rules in favor of the State's Amended Motion to Compel.

DATED this 13th day of November, 2001.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of 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 was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 13th day of November, 2001:

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