

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel Storage Installation))	December 14, 1999

DECLARATION OF MICHAEL F. SHEEHAN, Ph.D.

I, Michael F. Sheehan, declare under penalty of perjury and pursuant to 28 U.S.C. § 1746, that the statements contained in State of Utah's December 14, 1999 Motion to Compel Applicant to Respond to State's Fourth Set of Discovery Requests, relating to Utah Contention E, are true and correct to the best of my knowledge, information and belief.

Executed this 14th day of December 1999.

By:



Michael F. Sheehan, Ph.D.

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



JAN GRAHAM
ATTORNEY GENERAL

CAROL CLAWSON
Solicitor General

REED RICHARDS
Chief Deputy Attorney General

PALMER DEPAULIS
Chief of Staff

July 20, 1999

Via Electronic and First Class Mail

Paul Gaukler, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington DC 20037-1128

re: Applicant's June 28, 1999 Responses to State's
Second and Third Set of Discovery Requests

Dear Paul:

The purpose of this letter is to confirm the State's concerns about PFS's above referenced discovery responses.

1. Applicant's Objections and Proprietary Responses to State's Second Requests for Discovery (Groups II & III)

The State requested PFS supplement its responses to Contention E, Requests for Admissions Nos 1 & 4 and Document Requests 1-3, 6-7, 15, 18, part of 19 (marketing), 20 and 22. In general, PFS objected to responding to the foregoing asserting that the issues were outside the scope of the admitted contention. The State argued that for purposes of discovery the question was not the scope of the contention but whether the requested information would lead to discovery of admissible evidence.

The State was particularly concerned about the Applicant's response to Document Request No. 7 wherein PFS objected to

providing correspondence concerning ongoing negotiations even under the confidentiality agreement it has with the State given the highly sensitive and confidential nature of such communications, particularly in view of the Governor's past practice of directly communicating with PFS member utilities to discourage their further participation in PFS.

First, this response is totally inappropriate. It has no basis in fact or under the rules of discovery. Second, the response was the first indication to the State that PFS had any

concerns about the State's use of information it receives under the State-PFS confidential agreement. The State has gone through the tedium of filing proprietary pleadings even though the State does not believe all the information is confidential. The State further agreed to file a proprietary pleading on the understanding that PFS would later justify to the NRC that the information is confidential. Further, I explained that the Governor has not received any PFS confidential information from the litigation proceeding.

Moreover, PFS's response raised additional concerns about the scope of the information the State can expect to receive under the Confidential Agreement. Given PFS's response to Document Request No. 7, the State is concerned that PFS may view the scope of a contention narrowly or withhold relevant information because of what PFS claims to be "sensitive" communications. If PFS has a problem with the State's use of PFS confidential information then we should confront the issue head on; it is not a legitimate basis for failing to respond to discovery.

PFS objected to responding to the above mentioned discovery because it asserted the requests were not relevant to Contention E in that the requests dealt with reprocessing and disposal of fuel at the end of PFS's operation (Admissions 1 & 4 and Documents Requests 1-3 and 18) or dealt with PFS ability to market the facility (Document Requests No 1-7, 15 and 19) or were transportation-related issues (Documents Requests No. 20, 22).

2. Applicant's Objections and Proprietary Responses to State's Third Requests for Discovery

In this response the State requested PFS to supplement its responses to Contention E, Document Requests No. 2-3, 5, 10, 12-15; Contentions S, Admission Requests 1, 5-6, 16-18 and Document Requests 3-5, 8, 11 and 16.

a. Contention E. PFS again objected to supplementing a response on the basis that marketing (Document Request No. 2) and reprocessing/disposal (Document Request No. 3) are not relevant to the contention; and that in Document Requests 5, 10, 12, 13 and 15 PFS maintained that it was making normal use of the work "relevant" and not trying to narrow the documents it would provide to the State. Finally, Document Request 14, PFS stated it has or will provide all documents that it has in its possession but it will not solicit utilities, including its member utilities, for the requested information (*i.e.* costs or estimated cost of construction and/or operation of other existing or proposed on-site or off-site ISFSIs)

b. Contention S. Admission Request No. 1, PFS stated that it did not understand the term "economic life" and even if it did, it is not relevant to the contention. PFS will respond to Admission Request No. 5 (basis of the \$17,000 cost), but will not respond to Admission Request No. 6 (basis for the 20% contamination estimate). I argued that the 20% contamination estimate was the underlying premise for the \$17,000 figure and should be answered. You were going to check whether PFS

would respond but I am unsure whether we reached a decision. You advised me that PFS won't answer Admission Requests 16-18 because the requests deal with non-radiological costs. PFS will answer Document Requests No. 3 and 5 but not Request No. 4 because it is based on the 20% contamination issue. PFS will also answer Documents Request No. 8 part (d) and (e) and may or may not answer part (a-c). You mentioned you would get back to me on Document Request No. 11. Finally, PFS will not answer Document Request 16 (documentation showing what the potential is for contamination of casks when "normal conditions" do not obtain) because you claim it is beyond the scope of the contention.

3. Applicant's Objections and Non-Proprietary Responses to State's Third Requests for Discovery

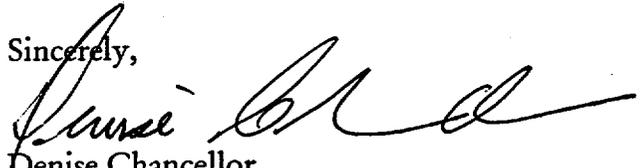
The only issue here was PFS use of the term "relevant" especially with respect to Contention Z. You informed me that it was the normal use of the term as it relates to documents "relevant" to a contention.

4. State's Response to PFS's Unwillingness to Supplement Responses

I informed you that the State would not be filing a motion to compel today on the responses PFS was unwilling to supplement. Instead, I requested that PFS not take a narrow view of "relevance" or the scope of a contention when determining what documents it will forward to its repository in Salt Lake City or otherwise make available to the State. I also requested that to the extent that PFS may believe it has a legal reason for objecting to document request that it, nonetheless, produce all requested documents. Finally, the State again requests PFS to review the redacted portions of produced documents, in particular the PFS Board Minutes, to determine whether any relevant information (as interpreted under discovery rules) should be released.

I understand that another set of documents will shortly be available for the State's review at Parsons, Behle & Latimer. For now the State is willing to forego a Motion to Compel. However, after review of the produced documents, and during the discovery window in January and February 2000, the State may take a different view of PFS's unwillingness to respond to the issues identified in this letter. If you have any questions, or if I have mischaracterized our discussion, please do not hesitate to contact me at (801) 366-0286.

Sincerely,



Denise Chancellor
Assistant Attorney General

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



JAN GRAHAM
ATTORNEY GENERAL

JAMES R. SOPER
Solicitor General

REED RICHARDS
Chief Deputy Attorney General

December 13, 1999

Paul Gaukler, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington DC 20037-1128

Via E-mail and First Class Mail

re: State's Proposed Motion to Compel PFS to Respond to
State's Fourth Set of Discovery Requests (Contention E)

Dear Paul:

This letter follows up on my telephone conversation with you on December 10, 1999. First, we both agreed that the State should consider that it was served with the Applicant's response to Discovery on December 7, 1999¹ and thus, the seven days for the State to file a Motion to Compel Discovery commenced on December 7.

Second, I advised you on Friday that the State intended to file a Motion to Compel discovery on PFS's failure to respond to those discovery requests in which PFS argued that it need not legally respond to marketability-related issues. It should be noted, however, that while Basis 7 of Contention E deals specifically with marketability, some of the State's discovery requests that PFS has objected to on marketability grounds relate to PFS's ability to assure whether there is a realistic probability that PFS will have sufficient funds to construct and operate the facility, and the terms under which such funds may be acquired for the project or withdrawn from the project. Thus, while PFS objects to responding to discovery on marketability grounds, the State believes that the issue is much broader than marketability. I further advised you if there were any other issues that the State intends to

¹ As permitted by the Board's procedural rulings on serving proprietary pleadings, the Applicant served its discovery responses on the State by fax at approximately 11 pm EST, December 6, 1999, such that the State received the document on the day after the response was due.

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include in its Motion to Compel, I would advise you of them today. Accordingly, this letter discusses, specifically, those discovery requests (all of which relate to Contention E) that the State will request the Board to compel responses.

On December 7, 1999 the State was served with a copy of the Applicant's Motion for Summary Disposition for Utah Contention E, all bases for except basis 6 ("Summary Disposition Motion"). In general, PFS's marketability legal arguments for not responding to the State's discovery are mirrored in the arguments PFS raised in the Summary Disposition Motion (PFS also cited to the Motion in its discovery response). The State in its response to the Summary Disposition Motion will present its arguments about the continued relevance of marketability under admitted basis 7 of Contention E, as well as the relevance of all the bases under which Contention E was admitted by the Board. To protect the State's interests, however, the State intends to file a Motion to Compel PFS to answer the discovery requests PFS refused to answer if and when the Board denies PFS's Motion for Summary Disposition, in whole or in part.

The State also intends to request in its Motion to Compel that should the Board grant the State's motion, the State not be constrained by the limitation of using no more than four interrogatories after December 31, 1999 because the Summary Disposition Motion will not be decided until some time in January, 2000. Depending on the timing of the Board's Summary Disposition decision, the State may also request additional time for discovery on any and all issues that remain after the decision is issued. The State feels that it has not waited until the last minute to raise these issues. As you are aware, the State and PFS tried unsuccessfully to resolve PFS's refusal, based on the same marketability arguments, to answer similar discovery requests directed to PFS by the State during the formal discovery period.

As to the specific discovery responses, PFS's responses to Request for Admissions No. 3 through 7; 2nd sentence of Request for Admission No. 8; and Documents Requests 5, 6 and 8, and 2nd sentence of No. 7, relate to marketability. Thus, under basis 7, these discovery requests are not only relevant but also germane to the State's preparation for trial. These requests also relate to Bases 2 and 8. Moreover, Request for Admission No. 4 and 5 relate to Basis 1. All of the foregoing bases form part of PFS's Motion for Summary Disposition.

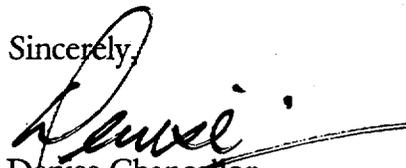
Document Request No. 13 and 14. The recent Energy Resources International ("ERI") revision ("Supko Study") provided a partial production under these two document requests. PFS, however, has claimed some of the material in the Supko Study is proprietary to ERI. The State is handicapped in analyzing the revision to the Supko study because it

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does not have access to the spreadsheets relating to the study. The Supko study is relevant to Contention E, Basis 2, 7 and 8. To the extent that PFS cannot obtain timely access to those spreadsheets, the State believes that it must protect its interest by including this request in the Motion to Compel. In the meantime, I am more than willing to work with you in determining whether there are reasonable measures we can work out to allow the State timely access to the spreadsheets.

If you have questions, I will be in the office all day today and tomorrow. I will not file the Motion to Compel until late in the day tomorrow.

Sincerely,



Denise Chancellor
Assistant Attorney General

cc: Sherwin Turk, Esq., NRC, Office of General Counsel