

June 4, 1999

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
	)	
(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

**APPLICANT'S OPPOSITION TO OGD'S MOTION TO EXTEND DISCOVERY
AND MOTION TO QUASH OGD'S NOTICE OF DEPOSITION OF LEON BEAR**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") files this opposition to "Intervenor Ohngo Gaudedah Devia's Motion to Extend the Discovery Period" – which OGD filed on the last day of formal discovery, May 28, 1999 – and, as lead party opposing OGD Contention O, moves to quash OGD's "Notice of Deposition for Leon D. Bear," of the same date. In its order of December 23, 1998, the Atomic Safety and Licensing Board ("Board") established that formal discovery was to run from March 1, 1999 through May 28, 1999.¹ Although having three months in which to conduct its discovery, OGD has chosen to wait until the last day of formal discovery to request an extension of discovery in which to depose Leon Bear. Although OGD claims that it is only requesting a two day extension, in fact it is seeking an extension from May 28 until June 16, the date on which it seeks to depose Mr. Bear. OGD has not followed the Board's

¹ The Board has subsequently endorsed a limited two-month window for additional formal discovery for both Group II and Group III contentions to occur closer in time to the actual hearing on those contentions. See Memorandum and Order (Granting Motion for Additional Limited discovery on Group II and Group III Contentions), dated March 29, 1999 and Memorandum (Additional E-mail Address for Administrative Judge Kline and Revised General Schedule), dated May 18, 1999.

procedural requirements for the filing of extensions of time – which are in accordance with well established Commission precedent – and has provided no showing of good cause for its failure to follow these requirements or for the requested delay itself. Thus, the Board should deny OGD's requested extension and quash the related notice of deposition of Leon Bear.²

In its Initial Prehearing Order of September 23, 1997, the Board established procedures “[f]or any motion for extension of time filed with the Licensing Board in this proceeding, except upon a showing of good cause. . . .” Memorandum and Order at 6.

Under these procedures, “the participant requesting the extension shall:

1. Ascertain whether and when any other participant intends to oppose or otherwise respond to the motion and apprise the Licensing Board of that information in the motion; and
2. Serve the motion on the Licensing Board so that it is in its hands at least three business days before the due date for the pleading or other submission for which an extension is sought.”

Id. at 6-7

Here, OGD did not file its motion “three business days before” the due date for which it seeks an extension, but chose to wait instead until the very end of the last day of the formal discovery period to seek an extension of formal discovery in order to depose Leon Bear on June 16, 1999. Moreover, OGD did not inquire of counsel for the Applicant as to its position on the motion and by the same token, therefore, was not able to apprise the Board of Applicant's opposition to the motion. OGD has provided no showing

² Although OGD has failed to take Leon Bear's deposition during this phase of formal discovery, the two-month window of additional formal discovery for Group III contentions will provide OGD a second op-

of good cause for its failure to follow the procedural requirements set forth in the Board's Initial Prehearing Order (or for the requested extension itself), and therefore the Board should deny the requested extension and quash the related notice of deposition for Leon Bear.

In its motion, OGD argues four points in support of its requested extension. First, OGD claims that it needs to depose Chairman Bear because he has supplied information to the NRC related to various aspects of the environmental justice issues raised by OGD. OGD's supporting reference is to the February 18, 1999 responses made by PFS to the Environmental Requests for Additional Information, which were served on counsel for OGD at that time. Information that was available to OGD prior to the March 1, 1999 commencement of formal discovery cannot serve as the basis for extending the formal discovery deadline three months later, much less provide good cause for OGD's failure to adhere to the Board's procedural requirements for the filing of an extension of time.

Second, counsel for OGD makes various assertions – lacking any affidavit support – of a purported need to depose Mr. Bear concerning resolutions passed at the Skull Valley Tribal Council meeting of April 24, 1999. Applicant understands that the resolution, and the related restrictions, relate to Tribal members maintaining the confidentiality of business information related to Tribal businesses (current and potential), including proprietary information related to the PFS project. Wholly apart, however, from the broader

portunity to schedule Mr. Bear's deposition.

confidentiality issues of the Tribal resolution, relevant confidential and proprietary information would be available to OGD and its counsel under a confidentiality agreement. On January 11, 1999 Applicant sent for review to counsel for OGD a draft confidentiality agreement – essentially identical to that which the State and PFS have entered – that would allow OGD and its counsel access to PFS confidential and proprietary information that may be relevant to OGD’s Contention O (such as the PFS lease agreement with the Band and payments to the Band) subject to maintaining the information confidential under the terms of the agreement. Counsel for OGD has never responded with respect to the draft confidentiality agreement.³ Moreover, even assuming a further need to depose Chairman Bear on the April 24 meeting and resolutions insofar as OGD Contention O issues are concerned – which has not been shown – OGD had five full weeks subsequent to that meeting to schedule and depose Chairman Bear and has made no showing why it could not do so during that five-week period, or why it could not follow the Board’s procedural requirements for requesting an extension.

³ Applicant similarly noted in its answers to OGD’s First Discovery Request that the confidential commercial and financial portions of the lease related to OGD Contention O (and other relevant confidential information) would be available to OGD and its counsel upon execution of a confidentiality agreement, a draft of which had been sent to counsel for OGD for review. See Applicant’s Objections and Responses to OGD’s First Request for Discovery, dated May 20, 1999, at 8. In its motion to compel, OGD now claims for the first time – without ever having responded to Applicant’s January 11, 1999 letter forwarding the draft confidentiality agreement – that Applicant “fails to articulate a basis for requiring such an agreement in its response, and is no longer timely to present such a basis to the Board.” Intervenor Ohngo Gaudedah Devia’s Motion to Compel Answers to Interrogatories and to Produce documents Directed to the Applicant, dated May 27, 1999 at 12. As OGD well knows, however, the Bureau of Indian Affairs has determined that these portions of the lease are not releasable under the Freedom of Information Act because they contain confidential commercial and financial information which fall with Exemption 4 of that Act. Indeed, two of OGD’s members (Margene Bullcreek and Garth Bear) filed a FOIA request with the Bureau of Indian Affairs for this very information, a request which the Bureau rejected. OGD is also aware that the State of Utah and these OGD members are currently challenging that determination before the

Third, OGD argues that its request for an extension of time to depose Chairman Bear should be granted based on Applicant's acknowledgement (in PFS's May 20 Objections and Responses to OGD's First Request for Discovery at page 8) that information in "the final lease . . . may be relevant [to OGD's contention] insofar as it identifies payments and other benefits to the Band." OGD, however, knew of Applicant's position on this point far in advance of the commencement of formal discovery, for Applicant had advised counsel for OGD of PFS's position on this precise point last November during informal discovery. See Exhibit 1 (November 24, 1998 letter from Paul A. Gaukler to Joro Walker without attachments) at page 3.⁴ Thus, OGD's reliance on PFS' May 20 pleading for its requested extension is misplaced.

Fourth, OGD argues that because the Board has granted the State and PFS discovery extensions, "OGD should receive the same consideration" and that "granting OGD's similar request will clearly not prejudice the parties." OGD ignores, however, that the State and PFS followed the Board's procedures for requesting extensions of time and that none of the lead parties for the contentions that were the subject of those extensions opposed the motions. Here, OGD has not followed the Board's procedures and Applicant opposes the request because OGD has not shown any good cause for its requested delay. Moreover, Applicant would be severely prejudiced by the granting of OGD's motion, for

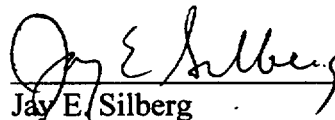
United States District Court for the District of Utah. State of Utah v. U.S. Department of the Interior, Case No. 2:98-CV-380K.

⁴ Applicant stated there, as in its Objections and Answers quoted above, that "it is the final lease . . . that may be relevant insofar as it identifies payments and other benefits to the Band."

it would require counsel for Applicant to travel to Utah during the middle of the week of June 14 for the deposition of Chairman Bear, which would greatly interfere with Applicant's responding to the State's discovery requests for Group II and Group III contentions due June 18, 1999 as well as interfere with Applicant's working on motions for summary disposition, which are due by June 28, 1999. Further, even if the deposition were delayed beyond these immediate deadlines, it would interfere with Applicant's preparation of direct testimony and other preparations for the November hearing on the Group I contentions, which will now constitute the focus of Applicant's efforts through the end of that hearing. Having missed being able to depose Chairman Bear in the initial formal discovery period – entirely as a result of its own inaction – OGD should now await the limited two month window for additional formal discovery for Group III contentions, as provided for by the Board orders cited earlier.

In short, none of OGD's supporting arguments provide good cause for OGD's failure to adhere to the Board's procedural requirements for the filing of motions for extensions of time or for the requested extension itself. Thus, the Board should deny the requested extension and quash the related notice of deposition for Leon Bear

Respectfully submitted,



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Dated: June 4, 1999

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Applicant's Opposition to OGD's Motion to Extend Discovery and Motion to Quash OGD's Notice of Deposition of Leon Bear was served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 4th day of June, 1999.

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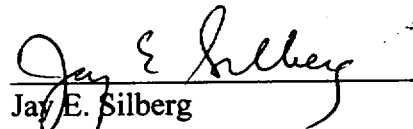
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