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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECURITY
REGISTRATION AND
ADJUDICATION STAFF

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 STATE OF UTAH'S MOTION TO COMPEL
ON THE STATE'S EIGHTH SET OF DISCOVERY REQUESTS**

On January 18, 2000, the State of Utah filed "State of Utah's Motion to Compel Applicant to Respond to State's Eighth Set of Discovery Requests," [hereinafter State Mot.].¹ The State seeks to compel Applicant to respond to State discovery requests concerning Contentions Utah E and Utah S, specifically Utah E Request for Admission No. 5 and Interrogatory Nos. 5 and 7-9 and Utah S Interrogatory No. 5. State Mot. at 2, 6-7. Pursuant to 10 C.F.R. § 2.730(h), Private Fuel Storage L.L.C. ("Applicant" or "PFS") files this answer opposing the motion.

PFS objected to Utah E Request for Admission No. 5 and Interrogatory Nos. 5 and 9 (in part) on the grounds that they were not reasonably calculated to lead to the discovery of information relevant to PFS's financial qualifications, the subject of Utah E. PFS will demonstrate its financial qualifications to build and operate the Private Fuel Storage Facility ("PFSF") through commitments it has made regarding the financing of

¹ See State of Utah's Eighth Set of Discovery Requests Directed to the Applicant (Utah Contentions E & S) (December 29, 1999) [hereinafter State Req.]; Applicant's Objections and Responses to State of Utah's Eighth Set of Discovery Requests [Non-proprietary Version] (January 11, 2000) [hereinafter PFS Resp.].

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construction and operation and the State requests pertain to matters irrelevant to PFS's demonstration given its commitments. See PFS Resp. at 4-5, 9-10.² Therefore, PFS asks the Board to deny the State's motion. In the alternative, if the Board rules in PFS's favor on its motion for summary disposition of Utah E, PFS asks the Board to dismiss the State's motion to compel as moot, in that it would pertain to matters no longer within the scope of this proceeding, i.e., the dismissed bases of Utah E.³

PFS objected to Utah E Interrogatory Nos. 7 and 8 and Utah S Interrogatory No. 5 on the grounds that they seek information PFS has already provided to the State, in that the requests ask PFS to analyze documents PFS has previously produced to the State. See PFS Resp. at 6-8, 16-17. PFS asks the Board to deny the State's motion with respect to those requests because the requests ask PFS to do more than the rules of discovery require.

I. BACKGROUND

On December 3, 1999, PFS filed a motion for partial summary disposition of Utah E, which requested that the Board dismiss bases 1-5 and 7-10 on the grounds that: 1) they had been rendered moot by PFS's commitments on the financing of the construction and operation of the Private Fuel Storage Facility (PFSF), 2) they were legally groundless, or 3) they had been satisfied by PFS. PFS Utah E Mot. at 4-5.

² See also Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (December 3, 1999), at 5-10 [hereinafter PFS Utah E Mot.]. PFS's motion would also, if ruled upon in PFS's favor, render moot the State's motion to compel with respect to Utah E Request for Admission No. 5 and Interrogatory No. 5 and 9 by resolving in PFS's favor the bases of the contention to which the challenged discovery pertains.

³ See note 2 *supra*; see also Applicant's Opposition to State of Utah's Motion to Compel on the State's Fourth Set of Discovery Requests (December 21, 1999), at 2, 9-10.

PFS's financial commitments are as follows: 1) PFS will not begin construction of the PFSF until it has funding committed sufficient to cover the cost of construction of a facility with a storage capacity of a fixed number of spent fuel storage casks and 2) PFS will not commence the operation of the PFSF until it has entered into Service Agreements with its customers sufficient to cover the costs of debt servicing (if any) plus the entire cost of operating and maintaining the PFSF. PFS Utah E Mot. at 7-8.⁴

On December 29, 1999, the State filed the discovery requests in question here. State Req. at 3-5, 7. On January 11, 2000, PFS filed its objections and responses to the State's discovery requests. See PFS Resp. at 4-10, 16-17.

II. THE BOARD SHOULD DENY THE STATE'S MOTION

The Board should deny the State's motion regarding Utah E Request for Admission No. 5 and Interrogatory Nos. 5 and 9 because the State seeks to compel PFS to respond to discovery requests that seek information that has no bearing on PFS's financial qualifications (the subject of Utah E), given PFS's financial commitments.⁵ The Board should deny the State's motion regarding Utah E Interrogatory Nos. 7-8 and Utah S Interrogatory No. 5 on the grounds that they ask PFS to perform analysis on the State's behalf

⁴ The committed funding PFS will rely on to meet construction costs will include member equity contributions, customer Service Agreements, and other forms of committed financing. PFS Utah E Mot. at 8. The precise storage capacity of the facility to which PFS has committed to obtaining funding is proprietary information. See id. at 7-8. PFS made its formal commitment on construction financing in response to an NRC Staff RAI on September 15, 1998. It made its formal commitment on operating and maintenance costs in its motion for summary disposition of Utah E on December 3, 1999.

⁵ In the alternative, as stated above, if the Board grants PFS's motion for partial summary disposition of Utah E, then the State's motion with respect to these requests should be denied as moot, in that the contention bases to which the discovery in question pertains will no longer be part of this proceeding.

that is beyond what is required by the Commission's discovery rules and the Federal Rules of Civil Procedure.

A. The State Seeks Material That has No Bearing on PFS's Financial Qualifications

The Commission's discovery regulations allow that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding" 10 C.F.R. § 2.740(a)(1). The subject matter of Contention Utah E is PFS's financial qualifications to build and operate the PFSF. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 251-52 (1998). Because PFS has chosen to use financial commitments to demonstrate its financial qualifications, rather than some other means, PFS Utah E. Mot. at 3-10, discovery requests that are not reasonably calculated to lead to admissible evidence concerning PFS's financial qualifications, given its financial commitments, are outside the scope of the contention and hence are impermissible. The State's argument that discovery is permissible so long as it pertains to the admitted bases of the contention, State Mot. at 7-8, is wrong. PFS's financial commitments have rendered those bases moot and hence discovery requests that pertain to them are outside the scope of the contention and this proceeding.⁶

⁶ See Applicant's Opposition to State of Utah's Motion to Compel on the State's Fourth Set of Discovery Requests (December 21, 1999), at 5-9.

1. The State Requests Seek Information Concerning PFS's Current Assets Which Are Irrelevant to PFS's Demonstration of Its Financial Qualifications

Utah E Request for Admission No. 5 asks PFS to "admit that, to date, PFS has not raised sufficient capital, such as from contributions, donations, or debt financing, to commence construction of the PFS facility in September 2000." State Req. at 3. This request seeks material that has no bearing on PFS's showing of its financial qualifications given its financial commitments. PFS's financial qualifications are based not on its assets but rather on its commitments not to build the PFSF without committed funding sufficient to cover construction costs and not to operate the PFSF without sufficient customer Service Agreements sufficient to cover the cost of operation and maintenance plus the amortization of any debt remaining from facility construction. See supra; PFS Utah E Mot., Parkyn Dec. at ¶¶ 5-7.⁷ PFS's assets "to date" have no bearing whatsoever on whether PFS's commitments adequately demonstrate that it is financially qualified to build and operate the PFSF.⁸ Thus the State's motion with respect to this request should be denied.

⁷ In its response to PFS's motion for partial summary disposition of Utah E, the State blatantly misrepresented PFS's commitments by asserting that the commitment regarding operation of the PFSF would not cover the amortization of construction debt. State of Utah's Resp. to the Applicant's Mot. for Part. Summ. Disp. of Utah Contention E . . . (December 27, 1999) at 12; Statement Disp. Mat. Facts at ¶¶ 32, 46, 71; Sheehan Dec. at ¶¶ 9b, 9k. The declaration of PFS Chairman John Parkyn clearly states "PFS will not commence operation until it has Service Agreements in place with its members and customers sufficient to cover the costs of operating and maintaining the facility, including the amortization of any debt financing used to construct the PFSF . . ." Parkyn Dec. at ¶ 7 (emphasis added).

⁸ See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 304 (1997) [hereinafter LES]; Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36-37 (1998) (citing LES).

2. The State's Requests Seek Information Pertaining to the Market for Spent Fuel Storage and PFS's Marketing Efforts Which Are Irrelevant to PFS's Demonstration of Its Financial Qualifications

Utah E Interrogatory No. 5 requested information about current and potential competitors for PFS. State Req. at 3. This request is not reasonably calculated to lead to the discovery of material relevant to Contention Utah E. The identity of or any other information pertaining to PFS's potential competitors is irrelevant to the determination of PFS's financial qualifications. As indicated above, PFS will demonstrate its financial qualifications through its funding commitments, not by any assessment of its competitors or by any comparison of the attractiveness of the PFSF vis-a-vis any facility maintained by a PFS competitor now or in the future.⁹

Utah E Interrogatory No. 9 asked PFS to "provide the name, title and affiliation with PFS of the individual(s) responsible for developing the PFS Business Plans; approving the PFS Business Plans; preparing the PFS budget(s); developing a PFS marketing plan or strategy; implementing a PFS marketing plan or strategy; and developing and deciding upon the PFS facility construction schedule." State Req. at 4-5. Contrary to what the State implies, see State Mot. at 9, PFS has provided to the State "the name, title and affiliation with PFS of the individual(s) responsible for developing the PFS Business Plans; approving the PFS Business Plans; preparing the PFS budget(s); . . . and developing and deciding upon the PFS facility construction schedule." PFS Resp. at 10. Thus

⁹ The State suggests that PFS's justification of confidential treatment of proprietary information in part by the competitive harm that PFS would suffer from its disclosure, see State Mot. at 8 n.5, somehow makes its request relevant. However, the fact that PFS may suffer competitive harm from such disclosure, e.g., the loss of customer support, is wholly irrelevant to the determination of its financial qualifications in view of its commitments set forth above.

those aspects of Utah E Interrogatory No. 9 provide no basis whatsoever for the State's motion to compel, since PFS fully answer those aspects of Interrogatory No. 9.

PFS did not answer Interrogatory No. 9 with respect to those individuals "responsible for . . . developing a PFS marketing plan or strategy [or] implementing a PFS marketing plan or strategy" because such information is not reasonably calculated to lead to the discovery of evidence relevant to Contention Utah E. PFS's marketing plan or strategy is irrelevant to PFS's showing of its financial qualifications. As indicated above, PFS will demonstrate its financial qualifications through its funding commitments. PFS's marketing is simply irrelevant to that demonstration.¹⁰ Therefore, the State's motion with respect to this request should be denied.

Thus, the State's requests are irrelevant to the financial qualifications of PFS, in that, as PFS indicated in opposing the State's earlier motion to compel on Utah E,¹¹ PFS's financial commitments render moot the issues of the market or need for spent fuel storage and PFS's marketing efforts. See LES, CLI-97-15, 46 NRC at 303-09; see also PFS Utah E Mot. at 5-10. PFS's commitments not to build the PFSF without committed funding sufficient to cover construction costs and not to operate the PFSF without customer Service Agreements in place sufficient to cover operating and maintenance costs obviate the need for PFS to demonstrate a market or need for spent fuel storage services. Id. at 3-10. Therefore, the State's motion with respect to these requests should be denied.

¹⁰ See LES, CLI-97-15, 46 NRC at 303-09 (rejecting arguments that the applicant was not financially qualified because it would "not be able to market its enriched uranium" where the applicant had made "commitments not to proceed [with the project] absent adequate funds"); see also PFS Utah E Mot. at 5-10.

¹¹ See Applicant's Opposition to State of Utah's Motion to Compel on the State's Fourth Set of Discovery Requests (December 21, 1999), at 6-7.

B. The State's Requests Ask PFS to Perform Analysis on the State's Behalf that is Beyond the Requirements of the Commission's Discovery Rules

The State's motion with respect to Utah E Interrogatory Nos. 7 and 8 and Utah S Interrogatory No. 5 should be denied because those requests ask PFS to analyze documents that PFS has already provided to the State and such analysis is beyond the scope of what the Commission's discovery rules and the Federal Rules of Civil Procedure require.

Utah E Interrogatory No. 7 requests as follows:

In response to State's document request for copies of reports or studies by utilities or others in PFS's possession or control dealing with the economics of the SNF *storage* market, PFS responded that it has already produced "all such reports or studies relevant to the costs of spent nuclear fuel storage that it has." See Applicant's December 6, 1999 Objections and Responses to State of Utah's Fourth Set of Discovery Requests (hereinafter "PFS Response Fourth Set") at 13, Response to Document Request No. 7. Please describe in detail (e.g., date, title, author, bates number, etc.) each and every such responsive report or study that PFS has already produced to the State.

State Req. at 4. Interrogatories Utah E No. 8 and Utah S No. 5 similarly request PFS to "describe in detail" documents PFS has previously produced to the State. Id. at 4, 7.

The State's motion with respect to these requests should be denied, in that they seek information PFS has already provided to the State. "Commission case law has long established that while in response to a discovery request a party must reveal information within its possession and control, . . . the party is not required to engage in independent research." Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,174 (1989) (citing Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 334 (1980)). "So long as prior to the trial, parties have an opportunity to learn what another party has done or what information that other party has to provide the basis for its

position, the party seeking discovery will be able to show in the hearing what, in its view, the other party should have done or why its position is incorrect.” Id.

Indeed, Federal Rule of Civil Procedure 33(d) states that:

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served, or from an examination, audit or inspection of such business records, including a compilation, abstract, or summary thereof and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which such answer may be derived or ascertained and to afford the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

By producing the documents, PFS has provided the State all the information it has requested and all the information within PFS’s possession and control.¹² Moreover, PFS produced the documents in a reasonably accessible and specific manner. PFS produces documents to the State at its repository of documents maintained at Parsons Behle & Latimer in Salt Lake City. The documents are sorted by contention by PFS prior to production. PFS has produced its documents over the course of nearly two years of formal and informal discovery and the State’s requests now ask PFS to go back through two years of production and provide a compilation or summary thereof. Neither the Commission’s discovery rules nor Rule 33 require PFS to bear such burden on the State’s behalf. The burden of compiling and summarizing documents PFS has sorted and given to the

¹² Indeed, despite the fact that such is not required under the rules, PFS provided the State with the author, title, and Bates No. for many of the documents in question that PFS had earlier produced. PFS Resp. at 7-9, 17.

State by contention, if it is not lighter for the State, is at least substantially the same for the State as it would be for PFS. Thus, it is for the State to bear.¹³

Contrary to the State's assertion, the provision of the Commission's discovery rules that allows a party to respond to a request by providing "the location, title, and a page reference to the relevant document," State Mot. at 10 (quoting Rules of Practice for Domestic Licensing Proceedings, 54 Fed. Reg. 33,168, 33,174 (1989)), does not require a responding party to provide this information in addition to producing the documents. Rather, it allows a party to refer to documents "reasonably available from another source" without having to provide copies of them. See 54 Fed. Reg. at 33,174. The Commission's discovery rules and the Federal Rules of Civil Procedure simply do not require PFS to analyze documents in the State's possession as the State requests. Thus, the State's motion with respect to these requests should be denied.

III. CONCLUSION

For the foregoing reasons, the State's motion to compel should be denied.

Respectfully submitted,



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Dated: January 25, 2000

¹³ Rule 33(c) "places the burden of discovery upon its potential benefitee." 1970 Advisory Committee Notes on Amendments to the Federal Rules of Civil Procedure, 48 F.R.D. 487, 524 (1970); Petroleum Ins. Agency v. Hartford Accident and Indem. Co., 111 F.R.D. 318, 320 (D. Mass. 1983).

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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RULEMAKING AND
ADJUDICATION STAFF

In the Matter of)	
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PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22 - ISFSI
)	
(Private Fuel Storage Facility))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Opposition to State of Utah's Motion to Compel on the State's Eighth Set of Discovery Requests was served on the persons listed below (unless otherwise noted) by e-mail this 25th day of January 2000 with conforming copies by U.S. mail, first class, postage prepaid, on the 26th day of January 2000.

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