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February 11, 2000

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

On February 7, 2000, the State of Utah filed "State of Utah's Motion to Compel Applicant to Respond to State's Ninth Set of Discovery Requests," [hereinafter State Mot.].<sup>1</sup> The State seeks to compel Applicant to respond to State discovery requests concerning Contention Utah E. 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 the State requests in question 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 construction and operation and the State requests pertain to matters irrelevant to PFS's demonstration given its choice to establish its financial qualifications by commitments as allowed under the Commission's LES decision. See,

<sup>1</sup> See State of Utah's Ninth Set of Discovery Requests Directed to the Applicant (January 19, 2000) [hereinafter State Req.]; Applicant's Objections and Responses to State of Utah's Ninth Set of Discovery Requests [*Non-proprietary Version*] and [*Proprietary Version*] (January 31, 2000) [hereinafter PFS Resp. [*NPV*] and [*PV*], respectively].

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e.g., PFS Resp. at 4.<sup>2</sup> Thus, the Board should 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.<sup>3</sup>

## 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.

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.<sup>4</sup>

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<sup>2</sup> See also Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (December 3, 1999), at 3-10 [hereinafter PFS Utah E Mot.]; Applicant's Response to State of Utah's Request for Admission of Late-Filed Bases for Utah Contention E (February 4, 2000) [hereinafter PFS Late Utah E]. PFS's motion would also, if ruled upon in PFS's favor, render moot the State's motion to compel by resolving in PFS's favor the bases of the contention to which the challenged discovery pertains. See PFS Utah E. Mot. at 10-16.

<sup>3</sup> 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 [hereinafter PFS Opp. 4<sup>th</sup>].

<sup>4</sup> 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

On January 19, 2000, the State filed the discovery requests in question here. State Req. at 1. On January 31, 2000, PFS filed its objections and responses to the State's discovery requests. PFS Resp. [NPV] and [PV]

## **II. THE BOARD SHOULD DENY THE STATE'S MOTION**

### **A. The State's Document Requests are Late**

The Board should deny the State's motion with respect to its document requests because those requests were untimely. The Board has directed that discovery requests be filed in time for the respondent to file a timely response by the close of the relevant discovery window and that parties have 15 days to respond to document production requests.<sup>5</sup> Since the State's request was filed on January 19, the 15 day response period ended on February 3. The discovery window for Group II contentions, which include Contention Utah E, however, closed on January 31.<sup>6</sup> The State's plea for relief, that it had overlooked the rule, see State Mot. at 4, should be refused. PFS filed discovery on the same day as the State and refrained from filing document requests it could have filed because it knew that the deadline for them had passed.<sup>7</sup> All the parties in this case should be held to the same standard.<sup>8</sup>

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costs in its motion for summary disposition of Utah E on December 3, 1999. Both have subsequently been formally incorporated into the PFSF license application. PFSF License Application, at 1-6.

<sup>5</sup> Memorandum and Order (General Schedule for Proceeding and Associated Guidance) (June 29, 1998).

<sup>6</sup> Memorandum and Order (Revised General Schedule) (September 20, 1999).

<sup>7</sup> See Applicant's Fifth Set of Formal Discovery Requests to Intervenors State of Utah and Confederated Tribes (January 19, 2000).

<sup>8</sup> Nevertheless, as stated in PFS's objections, PFS will "continue voluntarily to update its production of relevant documents in accordance with its agreement with the State." PFS Resp. [NPV] at 3.

**B. PFS's Commitments Demonstrate its Financial Qualifications at the Time of the Licensing Hearing**

In its motion for summary disposition of Utah E and in its response to the State's January 26, 2000 request for the admission of late-filed bases to Utah E,<sup>9</sup> PFS demonstrated that under 10 C.F.R. Part 72 financial qualification rules and the Commission's decision in Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997) [hereinafter LES], PFS's financial commitments not to build or operate the facility without sufficient committed funding (to which it will be bound by license conditions) demonstrate its financial qualifications at the time of the licensing hearing. PFS Utah E Mot. at 3-10; PFS Late Utah E at 3-18.<sup>10</sup>

The issues on which the State seeks discovery, such as PFS's income and assets, potential PFS members, PFS's efforts and ability to market customer Service Agreements, and the debt financing PFS may be able to obtain, all go to whether PFS will be able to meet its commitments. PFS's ability to meet its commitments is irrelevant to Utah E. If PFS does not meet these commitments, PFS will not be allowed to build or operate the facility. If PFS does not build or operate the facility, there is no safety issue and nothing to litigate. Under LES, the information which the State seeks to discover is not material to the licensing of the PFSF and hence is beyond the scope of this hearing. PFS Late Utah E at 7-15. Whether PFS has met its commitments will be determined by the NRC through the inspection of the means PFS puts forth at the time.<sup>11</sup> Under LES,

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<sup>9</sup> State of Utah's Request for Admission of Late-Filed Bases for Utah Contention E (January 26, 2000).

<sup>10</sup> The State's arguments in its request to admit Utah E late bases, that finding PFS financially qualified on the basis of its commitments would constitute a "post-hearing determination," are groundless. Id. at 7-12.

<sup>11</sup> NRC Staff Response to State of Utah's Request for Admission of Late-Filed Bases for Utah Contention E (February 4, 2000), at 12-13.

the Commission has made an applicant's commitment not to build or operate the facility without sufficient committed funding the material licensing issue. PFS Late Utah E at 9-12, 14-15. Such is permissible under the Atomic Energy Act and the inspections, tests, and elections provision of the Administrative Procedure Act. Id. at 14-15.<sup>12</sup> Therefore, discovery directed at information that might be relevant to the outcome of inspections but not PFS's commitments is not reasonably calculated to lead to evidence admissible at the hearing and hence PFS need not respond to it.

**C. The State Seeks Material Irrelevant to PFS's Financial Qualifications Given PFS's Choice to Establish Its Financial Qualifications By Commitments**

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. An appropriate analogy would be an intervenor seeking discovery on a dam to protect a facility against flooding where the applicant was

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<sup>12</sup> See Union of Concerned Scientists v. NRC, 920 F.2d 50, 55 (D.C. Cir. 1990); Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1449 & n.23 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985).

proposing to meet the NRC's flood protection requirements not by building a dam but by raising the site elevation of the facility.

**1. Some Issues Within the Bases of Utah E Are No Longer Relevant**

At the outset, the State claims that the material it seeks is discoverable in that it pertains to the admitted bases of Utah E. State Mot. at 5. The State is incorrect, in that many of the issues within the admitted bases of Utah E have been rendered moot by PFS's choice of financial commitments as the means by which it will demonstrate its financial qualifications.<sup>13</sup> Even assuming the material the State seeks pertained to issues within the admitted bases, given PFS's commitments those issues are no longer relevant to the licensing of the PFSF. Therefore, the State's requests must be rejected.

**2. The State Seeks Material Not Discoverable Concerning PFS's Membership**

The State's request to compel a response to its Requests for Admission Nos. 2-3, 5, 10-14, and 19-20 and Document Request Nos. 1, 12-15, 21, and 28, State Mot. at 5-7, should be denied, in that they seek material that has no bearing on whether PFS will be financially qualified given its commitments. The number of members PFS has, their respective interests in PFS, their identity, or their assets and obligations are irrelevant to whether PFS is financially qualified as of the time of the hearing. Under the LES decision, it is the applicant's commitments at the time of licensing not to build the facility without sufficient committed funding to cover construction costs and not to operate the facility without customer Service Agreements sufficient to cover operation and mainte-

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<sup>13</sup> See, e.g., PFS Utah E Mot. at 10-16; PFS Opp. 4<sup>th</sup> at 4-9.

nance costs that provides reasonable assurance that the applicant will have the necessary funds. Hence the applicant is financially qualified, in that if it does not have the funds, the facility either will never be built or will never operate. Given PFS's commitments, information on PFS's members is simply not material to the licensing of the PFSF. Thus, the State seeks material beyond the scope of the hearing, which is not discoverable.

**3. The State Seeks Material Not Discoverable Concerning the Rates PFS Will Charge**

The State's request to compel a response to its Request for Admission No. 7, State Mot. at 7, should be denied, in that the answer sought does not bear on PFS's financial qualifications. The request concerns the fees PFS may charge its customers. See PFS Resp. [PV] at 3. The spent fuel storage fees PFS may charge its individual customers have no bearing on PFS's financial qualifications, in that they do not pertain to PFS's commitments. Moreover, that information would even have no bearing on whether PFS would be able to meet its commitments (which is beyond the scope of the hearing), in that it is the cumulative amount of committed funding and the cumulative amount of customer Service Agreements that will determine whether the PFSF will be built and operated, not the rates charged individual customers.

**4. The State Seeks Material Not Discoverable Concerning PFS's Financial Base, Assets, Liabilities, and Capital Structure**

The State's request to compel a response to its Document Request Nos. 2-5, 9, 16, 19, and 29, State Mot. at 8, should be denied. The material sought does not bear on PFS's financial qualifications. The State seeks documents such as PFS Board meeting minutes, revenue/expense reports, tax returns, and corporate data. Such information,

concerning PFS's assets, liabilities, and capital structure, is not relevant to PFS's commitments and hence is not relevant to PFS's financial qualifications at the time of the hearing. State arguments that its litigation is being "unfairly hampered," State Mot. at 8 n.4, have no merit. The information the State seeks simply is not relevant to the licensing of the PFSF. The State's argument that the material relates to admitted Utah E Basis 4, id. n.5, is also of no merit, in that the issues in Basis 4 are no longer relevant to PFS's financial qualifications.

**5. Marketability Information Is Not Discoverable**

The State's request to compel a response to its Document Request Nos. 6-7, 11-14, 17, 21, 27-28, and 32-33, State Mot. at 9, should be denied. The material sought relates solely to marketing and the marketability of PFS's services and does not bear on PFS's financial qualifications. As PFS has previously indicated, e.g., PFS Utah E Mot. at 3-10, marketing and the marketability of PFS's services are not relevant to PFS's financial commitments and thus have no bearing on PFS's financial qualifications. Indeed, marketing and marketability are not even relevant to whether PFS will be able to meet its commitments, in that PFS will not do so by relying on projections of available funding (that one might derive from a spent fuel storage marketing study), but rather it will rely on actual committed funding and executed customer Service Agreements. Thus, the State's requests seek material not discoverable and must be rejected.

**6. The State Seeks Material Not Discoverable Concerning PFS's Ability to Obtain Debt Financing**

The State's request to compel a response to its Document Request No. 24, State Mot. at 9, should be denied. The State seeks information concerning PFS's ability to ob-



tain debt financing and the rates at which PFS might borrow money which have no bearing on PFS's financial commitments and hence its financial qualifications. PFS's commitments have rendered Utah E Basis 8, which relates to debt funding, moot. PFS Utah E Mot. at 16-17. Thus, the material the State seeks is not discoverable.

The State's argument that debt financing is a cost and hence is relevant to Utah E Basis 6, State Mot. at 10, is groundless. Basis 6 concerns the "estimated costs of construction and operation of the proposed ISFSI." LBP-98-7, 47 NRC at 252 (emphasis added). It relates to the cost of materials and labor that will be required to build the ISFSI and to operate it once built, at the time of construction and operation, respectively.<sup>14</sup> The adequacy of PFS's cost estimates—the subject of Basis 6—does not concern PFS's borrowing of money to pay such costs. Prior to PFSF operation, PFS will cover the cost of amortization of any debt used to fund facility construction—plus the cost of facility operation and maintenance—with revenue from customer Service Agreements. PFS Utah E Mot. at 8 (citing Parkyn Dec. at ¶ 7); see also PFSF License Application, at 1-6. Otherwise it will not build the facility. The amount of debt PFS will have to service is not an operational "cost" per se and hence is outside the scope of Basis 6.

**7. The State Seeks Material Not Discoverable Pertaining to PFS's Service Agreements**

The State's request to compel a response to its Document Request No. 25, State Mot. at 10, should be denied. That request seeks language from PFS draft Service

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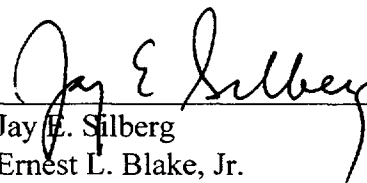
<sup>14</sup> See State of Utah's Contentions on the Construction and Operation License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility (November 23, 1997), at 34-35 (citing, e.g., costs of site preparation, construction of buildings, equipment, and the transportation corridor).

Agreements that “will require PFS to remain in existence.” PFS Resp. [PV] at 10. The State’s request must be rejected in that it seeks material privileged as attorney-client communications and attorney work product—the Service Agreements are being drafted by attorneys on PFS’s behalf. See PFS Resp. [NPV] at 2 (General Objection No. 2).<sup>15</sup> The State’s request must also be rejected because draft agreements are not relevant in that they are subject to change by prospective parties to them or by the attorneys drafting them. Moreover, PFS has made a statement on the record under penalty of perjury – the declaration of PFS Chairman John Parkyn – stating that the Service Agreement will contain a provision requiring PFS to remain in existence. Parkyn Dec. at ¶ 15, cited in PFS Utah E Mot. at 12. Such clearly indicates what PFS will do and provides the State with the information it seeks.

### III. CONCLUSION

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

Respectfully submitted,



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Dated: February 11, 2000

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<sup>15</sup> PFS had originally understood the request to seek language from actual Service Agreements and had responded that it had no such agreements at this time. PFS Resp. [PV] at 10.

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**UNITED STATES OF AMERICA**

**NUCLEAR REGULATORY COMMISSION**

OFFICE OF THE  
PUBLIC AFFAIRS  
ADJUTANT GENERAL

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

**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 Ninth Set of Discovery Requests" 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 11th day of February 2000.

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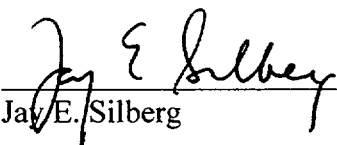
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