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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD '00 FEB 23 P3:49

In the Matter of:)		OFFICE OF SECRETARY
)	Docket No. 72-22-ISFSI	RULEMAKING DIVISION
)		ADJUDICATION STATE
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI	
(Independent Spent Fuel)		
Storage Installation))	February 18, 2000	

**STATE OF UTAH'S RESPONSE TO NRC STAFF'S MOTION
FOR A PROTECTIVE ORDER (CONTENTION E)**

Pursuant to the Board's Order of August 20, 1998, which allows a party seven days to respond to motions, the State responds to the Staff's February 11, 2000, Motion for a Protective Order (hereafter "Staff's Motion").

The State filed its Fourth Set of Discovery Requests Directed to the NRC Staff (Utah Contention E) (hereinafter "State's Fourth Set") on January 13, 2000; the Staff responded to the State's Fourth Set on January 28; and the State filed a Motion to Compel on February 4, 2000. All of the disputed discovery against the Staff relates to Contention E, Financial Assurance.

DISCUSSION

Upon motion and for good cause, the Licensing Board may "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense...." 10 CFR § 2.740(c). The Staff purports to need a protective order to protect the Staff from "'annoyance, oppression, or undue burden or expense' which would result if the Staff were required to provide further

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answers to the State's ... [Fourth Set of Discovery]." Staff's Motion at 1. The Staff, however, has not shown good cause, as required by 10 CFR § 2.740(c), why justice requires the Licensing Board to issue such an order.

The State's discovery against the Staff was prompted by the Staff's December 15, 1999 Statement of Its Position Concerning Group I-II Contentions ("Staff Position"). In fact, the State references the page, item and paragraph in the Staff Position for each of the ten disputed discovery requests. It is clear, therefore, that the State's discovery was prompted by the Staff's Position. It should also have been clear that the discovery was attempting to understand why the Staff considered that the Applicant's proposal met the financial qualifications of Part 72 and whether the Staff's actions comported with past precedent for implementing Part 72.

The Staff characterized the State's discovery as "unduly oppressive and improper." This is not so. When the Staff deemed that the PFS proposal met the requirements of Part 72, this opened the door to the State's discovery of the rationale behind the Staff's actions. Moreover, in any hearing on Contention E, the Applicant will undoubtedly argue that the Staff has accepted its proposal. Accordingly, the responses to the disputed discovery propounded on the Staff are necessary to a proper decision in this proceeding. See Consumers Power Co. (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 119 (1980). It should be noted that the State is not requesting a critique from the Staff of the PFS proposal; the State is requesting why the Staff took the action it did and why that action is consistent with the implementation of Part 72.

Significantly, the State's Motion to Compel is limited to ten requests for admissions. Unlike document requests and interrogatories, requests for admissions against the Staff are on the same footing as against any other party. Georgia Power Co (Vogtle Electric Generating Plant, Units 1 and 2), LBP 94-26, 40 NRC 93, 95-95 and n. 4 (1994). The State would have been satisfied with a "yes," "no," or "insufficient information to answer" response from the Staff, but the Staff was unwilling to so respond. Such responses, are not unduly oppressive on the Staff or improper. As more specifically described below, the Staff has not met its burden of showing good cause why justice requires the Board to issue a protective order.

A. Request for Admission No. 16.

The Staff asserts that the State's discovery relating to what showing the Staff has allowed in the past for utility Part 72 licensees (Request for Admission No. 16) is improper because the only proper issue is "whether PFS satisfies Commission regulations." Staff Motion at 3 (*emphasis in original*). Request for Admission No. 16, however, must be viewed in light of the reference to the Staff's Position, Item 2, page 3, ¶ 4, wherein the Staff plainly states that PFS does not expect to have executed service agreements in place prior to license issuance; PFS cannot document customer commitments; and that there is no guarantee that each PFS member will provide its share of the aggregate equity contribution. In light of the foregoing, a request to the Staff about how it has handled financial assurance for other Part 72 licensees is reasonable.

B. Request for Admission Nos. 24 to 29

The Staff argues that Request for Admission Nos. 24 through 29 (relating to the LES facility) are not necessary to a proper decision in this proceeding. Staff's Motion at 8. The State would agree with this statement but for the Staff's reliance on Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997) ("LES") as the measure by which the Staff will accept the license commitments proposed by PFS. Staff Position at Item 2, p.4 ¶ 2; SER at 17-2. If the Staff is going to consider the similarities between PFS and LES as a predicate for finding PFS in compliance with 10 CFR § 72.22(e), the Staff must also consider the differences between the two facilities. The intent of Request for Admission Nos. 24 to 29 is to understand whether the Staff took any of those differences into account in formulating the Staff's Position that the proposed license conditions meet the requirements of 10 CFR § 72.22(e). Therefore, the extent of the Staff's analysis of the LES proceeding is integral to understanding the Staff's rationale for finding the proposed license conditions (as applied to a spent nuclear fuel storage facility) satisfy the Commission's Part 72 financial assurance requirements. Accordingly, the disputed requests are necessary to a proper decision in this proceeding.

C. Request for Admission Nos. 44 and 46

The Staff argues that Request for Admission Nos. 44 and 46 (debt financing) are confusing. The Staff also says the phrase "documented market" is an undefined term "and is not recognized or understood by the Staff." Staff's Motion at 9. The Requests as written speak for themselves. In addition, the Staff should not complain that it does not

recognize the term “documented market” when the Staff’s Position, Item 7, p. 5, uses the caption “Documentation of an Existing Market...” and discusses the State’s bases “regarding the need to document an existing market...” The Staff has failed to show how these Requests are annoying, oppressive or unduly burdensome. See Staff’s Motion at 1.

D. Request for Admission No. 36

The Staff objects that Request for Admission No. 36 (relationship among customers) is “complex, multi-part ... overly vague and ambiguous.” Staff’s Motion at 10. It is true that the requested admission is “multi-part” but that does not make the request overly vague and ambiguous. In fact, the discrete three part Request for Admission No. 36¹ is clear and straight forward. It requires the Staff to admit or deny whether or not PFS has documented the relationship among PFS customers. The Staff has stated it has not seen the terms and conditions of any PFS proposed service agreement;² therefore, the State is attempting to ascertain how the Staff views the responsibility among customers in the event there are (a) customer defaults; (b) serious

¹ **REQUEST FOR ADMISSION NO. 36.** Please refer to Staff’s Position page 5, Item 5: “PFS has stated that Customers will retain title to their own fuel during storage . . . PFS plans to state in the Service Agreement the terms . . . PFS must address such considerations in the PFS Service Agreements . . .” Do you admit that PFS has not documented the relationships among customers, including but not limited to, (a) the responsibility of paying customers in the event another customer defaults on its payments, or (b) in the event of the need to apportion financial responsibility for a serious accident, or (c) in the event there is a need for funds to tide PFS over because required annual payments are insufficient to cover the costs of off-normal events.

² Staff Position at 3.

accidents; or (c) insufficient funds to cover the costs of off-normal events. The Applicant has chosen to rely on customer service agreements to fund the operation of the proposed ISFSI for the entire term of the license. Therefore, an essential component of the Staff's determination that the Applicant is financially qualified must include an evaluation of whether the service agreements will be sufficient to cover reasonably foreseeable contingent events over the entire license term. Thus, the request is reasonable and is directly relevant to whether the Applicant meets the financial qualifications of Part 72.

Finally, the Staff argues that to respond to Request for Admission No. 36 would be mere speculation and would not lead to admissible evidence. Staff Motion at 10. The Staff's decision, as articulated in the Staff's Position, attempts to gloss over how PFS's customers will confer on the Applicant the financial wherewithal to show that PFS is financially qualified to operate and maintain the proposed ISFSI over the planned life of the facility. To couch Admission Request No. 36 as speculative, is to ignore the serious financial and safety ramifications resulting from granting a Part 72 license to a financially unqualified Applicant. Accordingly, the requested admission is not speculative and may lead to admissible evidence of the Applicant's lack of financial qualifications.

CONCLUSION

For the reasons stated above, the Staff has not shown good cause, as required by 10 CFR § 2.740(c), why justice requires the Licensing Board to issue a protective order.

DATED this 18th day of February 2000.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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USNRC

I hereby certify that a copy of STATE OF UTAH'S RESPONSE TO NRC

'00 FEB 23 P3:49

STAFF'S MOTION FOR A PROTECTIVE ORDER (CONTENTION E) was served on

the persons listed below by electronic mail (unless otherwise noted) with conforming

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A handwritten signature in black ink, appearing to read "Denise Chancellor", written over a horizontal line.

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