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February 29, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

AD. . . .

In the Matter of)
)
PRIVATE FUEL STORAGE, LLC)
)
(Independent Spent)
Fuel Storage Installation))

Docket No. 72-22-ISFSI

NRC STAFF'S MOTION FOR PROTECTIVE ORDER,
AND RESPONSE TO "STATE OF UTAH'S MOTION
TO COMPEL NRC STAFF TO RESPOND TO STATE'S
FIFTH SET OF DISCOVERY REQUESTS (CONTENTION E)

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.730(c) and 2.740(c), NRC Staff ("Staff") hereby requests (a) that the Atomic Safety and Licensing Board ("Licensing Board") issue a Protective Order, to protect the Staff from the "annoyance, . . . oppression, or undue burden or expense" which would result if the Staff were required to provide further responses to the "State of Utah's Fifth Set of Discovery Requests Directed to the NRC Staff (Utah Contentions E, H and L)" ("Fifth Request"), dated January 31, 2000, as those requests pertain to Contention Utah E, and (b) that the Licensing Board deny the State of Utah's ("State's") pending motion to compel further responses by the Staff to those discovery requests, which the State filed on February 22, 2000.¹

¹ See "State of Utah's Motion to Compel NRC Staff to Respond to State's Fifth [Set] of Discovery Requests (Contention E)" ("Motion to Compel"), dated February 22, 2000. On February 22, 2000, the State filed two other motions to compel discovery responses by the Staff concerning Contentions Utah H and Utah L; those motions are addressed by the Staff in separate responses filed simultaneously herewith.

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In support of this request, the Staff submits that it has properly responded in part and objected in part to the State's fifth set of discovery requests, as set forth in the "NRC Staff's Objections and Responses to the 'State of Utah's Fifth Set of Discovery Requests Directed to the NRC Staff (Utah Contentions E, H and L)'" ("Staff Response"), dated February 14, 2000. Further, as more fully set forth below, the Staff submits that the State's discovery requests which are the subject of this motion to compel were improper and were properly objected to by the Staff. Accordingly, for the reasons more fully set forth below, the Staff respectfully submits that it is entitled to a protective order pursuant to 10 C.F.R. § 2.740(c), to protect the Staff from having to respond further to the State's Fifth Request, as it pertains to Contention Utah E; and that the State's motion to compel further responses to the State's Fifth Request should be denied.²

DISCUSSION

The instant discovery dispute pertains to the State of Utah's fifth set of discovery requests to the Staff, concerning Contention Utah E/ Confederated Tribes F ("Financial Assurance"). In that contention, the State generally contends that Private Fuel Storage, L.L.C. ("PFS" or "Applicant") has failed to demonstrate the financial qualifications required by 10 C.F.R. §§ 72.22(e) and 72.40(a)(6), and that PFS' application for an Independent Spent Fuel Storage Installation ("ISFSI") should therefore be denied. *See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142 (1998).

² The State had previously filed another set of discovery requests concerning Contention Utah E ("State of Utah's Fourth Set of Discovery Requests Directed to the NRC Staff (Utah Contention E)," dated January 13, 2000 -- containing 57 requests for admission, six interrogatories, and 20 document requests -- to which the Staff objected in part and responded in part on January 28, 2000. Those discovery requests and the Staff's responses thereto are the subject of a separate State motion to compel and Staff motion for protective order and are not the subject of the instant dispute.

In the State's motion to compel further responses by the Staff to its fifth set of discovery requests concerning Contention Utah E, the State seeks responses to Document Requests 9 and 10.

Those requests were as follows:

DOCUMENT REQUEST NO. 9. Please provide all documents that relate in any way to the two license conditions that appeared in the Staff's Safety Evaluation Report (SER), dated December 15, 1999, including how the conditions were developed.

DOCUMENT REQUEST NO. 10. Please provide all documents that relate in any way to the development of the two license conditions that appear in the Staff's corrected version of the SER, including how the conditions were developed.

Fifth Request at 8-9; emphasis added. The Staff objected to these two requests on the grounds that they (a) seek information that is not relevant to Utah Contention E and is not reasonably calculated to lead to the discovery of admissible evidence, (b) seek documents which may be available to the State from PFS or other sources, including "documents submitted by PFS in this proceeding, and applicable regulations, regulatory guidance and/or adjudicatory decisions in this and other proceeding(s)," and (c) seek the disclosure of "draft, predecisional or privileged documents that are exempt from disclosure under 10 C.F.R. § 2.790." Staff Response, at 9-10.

Pursuant to the Commission's regulations in 10 C.F.R. § 2.744(c), in seeking to compel the production of documents responsive to these requests, the State must demonstrate "the relevancy of the record or document to the issues in the proceeding." In addition, even if the document's relevancy is shown, its production may only be compelled if the Licensing Board finds that it (a) "is not exempt from disclosure under §2.790" or (b) "if exempt, its disclosure is necessary to a proper decision in the proceeding," and (c) "the document or the information therein is not reasonably

obtainable from another source." 10 C.F.R. § 2.744(c).³ The Staff submits that the State has failed to demonstrate that the production of documents responsive to Document Requests 9 and 10 should be compelled under these criteria.

In attempting to show the relevance of its requests, the State argues that they are relevant since they "relate to how the Staff drafted and made final the proposed license conditions, including the original recalled license conditions." Motion to Compel, at 3; emphasis added. Further, the State notes that the Staff's Safety Evaluation Report ("SER") proposes the imposition of license conditions as part of a financial assurance finding under 10 C.F.R. Part 72, and it asserts as follows:

Documents relied on or generated by the Staff to develop the reissued license conditions are directly relevant to the criteria the Staff found necessary to establish whether the Applicant meets the financial qualifications of 10 C.F.R. § 72.22(e). Furthermore, juxtaposing the Staff's analysis for the reissued license conditions against the original, recalled license conditions may reveal the range of issues that went into the Staff's position on what is required for the Applicant to meet 10 CFR § 72.22(e). Thus, the document request

³ It is well established that discovery against the Staff rests on a different footing than discovery in general. *See Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96, 97-98 (1981). While discovery from parties in an NRC adjudicatory proceeding is generally governed by the provisions of 10 C.F.R. § 2.740 *et seq.*, interrogatory and document discovery against the Staff is governed by the provisions of 10 C.F.R. §§ 2.720(h)(ii)-(iii), 2.744 and 2.790. *See also* 10 C.F.R. §§ 2.740(f)(3), 2.740a(j), 2.740b(a), and 2.741(e) (excluding discovery from the Staff from the general provisions of those regulations). These regulations establish certain limits to the Staff's obligation to respond to requests for discovery. For example, with regard to requests for the production of documents, the Commission's rules provide, in part, that a party may request the Presiding Officer to compel production of the documents, upon a showing that "the document is relevant to the issues in the proceeding; and the document is not exempt from disclosure under 10 C.F.R. § 2.790 -- or, if exempt, that the document or information is necessary to a proper decision in the proceeding and is not reasonably obtainable from another source." 10 C.F.R. §§ 2.744(c)-(d). With respect to interrogatories, the Commission's rules provide that the Presiding Officer may require the Staff to respond to interrogatories upon a finding that "the interrogatories are necessary to a proper decision in the proceeding and that answers to the interrogatories are not reasonably obtainable from any other source." 10 C.F.R. § 2.720(h)(2)(ii).

relating to the original, recalled license conditions is relevant to show what matters the Staff once considered necessary to demonstrate financial qualification in accordance with 10 C.F.R. § 72.22(e), but which it no longer considers necessary. . . .

Motion to Compel, at 4; emphasis added.

These arguments, which focus on the Staff's internal thought process, demonstrate the lack of relevance of these requests to the issues pending before the Board. The only issue that must be decided by the Licensing Board in connection with Utah Contention E is whether the application, with the proposed license conditions in place, satisfies the financial assurance requirements set forth in 10 C.F.R. Part 72. The Staff's reasoning in drafting its proposed license conditions -- or in discarding earlier iterations of those conditions⁴-- is simply not relevant to a determination as to whether the PFS license application (with the proposed license conditions in place) is legally sufficient under the Commission's regulations. Moreover, the Staff's review of a license application consists of a deliberative process that encompasses a vast number of issues. That deliberative process is simply not relevant to a determination as to whether the PFS application satisfies Commission regulations -- or even whether the final Staff determination correctly applies the Commission's regulations.⁵ Simply put, the Staff's internal deliberative process and earlier, preliminary iterations of its positions, are not relevant issues for adjudication in this proceeding.

⁴ As the Licensing Board is aware, Chapter 17 of the SER that was issued by the Staff on December 15, 1999, contained an incorrect version of the Staff's proposed license conditions; a corrected version of the SER was issued by the Staff on January 4, 2000. *See, e.g.*, "Memorandum and Order (Denying Motion to Strike Pleading)," dated February 4, 2000, at 2-3.

⁵ The fact that the Staff may have issued an incorrect or draft version of the SER does not make that version any more relevant than it would have been if it was never issued.

Further, even if the State had established the relevance of these documents to the issues before the Board, the State has not satisfied its obligation to show that the documents (a) are not exempt from disclosure under §2.790, (b) if exempt, disclosure is necessary to a proper decision in the proceeding, or (c) that the information contained therein is not reasonably obtainable from another source. *See* 10 C.F.R. § 2.744(c).

With respect to whether the information is "reasonably obtainable from another source," the State indicates that it "agrees" that the Staff may identify, in lieu of producing, publicly available documents upon which it relied in formulating its proposed license conditions. Motion to Compel, at 5. In this regard, without waiving its other objections, the Staff will undertake to identify the publicly available documents upon which it relied -- and, therefore, no issue remains to be decided by the Board with respect to the production of publicly available documents.⁶ Accordingly, the only issues left to be decided by the Board in connection with this motion to compel, apart from relevance, are (a) whether the documents that are not publicly available are exempt from disclosure under §2.790, or (b) if exempt, that their disclosure is necessary to a proper decision in the proceeding.

With respect to non-publicly available documents that may be responsive to these requests, such documents consist of (a) internal or draft Staff documents that reflect the Staff's internal deliberative process, and/or (b) attorney-client communications that are subject to the attorney/client privilege -- which is to be expected due to the nature of these requests, since they specifically seek

⁶ It is an adequate response to a discovery request for any party to state that the information or document requested is available in the public domain and to provide information to locate the material requested. 10 C.F.R. § 2.740(b)(1); *accord, Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 147-48 (1979).

documents concerning "the development of both the original and the reissued license conditions." Motion to Compel, at 6; emphasis added. As such, these documents are protected from disclosure under 10 C.F.R. § 2.790(3) and (5).⁷

Further, the Staff already (a) has published its proposed license conditions in the corrected SER, (b) has issued a detailed statement of its position concerning the adequacy of the Applicant's financial assurance with the proposed license conditions in place,⁸ and (c) as set forth above, has committed to identify the publicly available documents (including regulatory guidance and adjudicatory decisions) upon which it relied in formulating its proposed conditions. With respect to any non-publicly available Staff documents -- including documents protected from disclosure under the deliberative process and attorney-client privileges -- the State has not shown, nor made any attempt to show, that it has "an overriding need for the material." *See, e.g., Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 198 (1994). Accordingly, there is no basis for finding that the requested internal Staff documents, even if relevant, are "necessary to a proper decision in the proceeding." *See* 10 C.F.R. §§ 2.744(c).

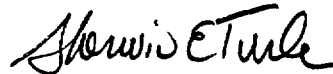
⁷ The State asserts that "the original and reissued license conditions were proposed in the SER -- a Staff decisional document released to the public. . . . Thus, documents relating to the proposed license conditions should no longer be considered predecisional." Motion to Compel - Utah E, at 6; emphasis added. This argument is without merit. The deliberative process privilege is intended "to encourage frank discussions within the government regarding the formulation of policy and the making of decisions." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1164 (1982). Under this privilege, pre-decisional documents are protected from disclosure even after the issuance of the agency's final "decisional" document, "since disclosure at any time could inhibit the free flow of advice, including analysis, reports, and expression of opinion within the agency." *Id., quoting Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340, 360 (1979).

⁸ *See* "NRC Staff's Statement of Its Position Concerning Group I-II Contentions," dated December 15, 1999, at 2-6.

CONCLUSION

The Staff has properly objected to producing documents in response to Document Requests Nos. 9 and 10 (Utah Contention E) in the State's Fifth Request, which seek documents concerning the development of the Staff's proposed license conditions. Accordingly, for the reasons set forth above, the State's motion to compel the production of documents pertaining to Contention Utah E, should be denied, and the Staff should be protected from having to produce documents in response to these requests.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 29th day of February 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD MAR -1 P4:17

In the Matter of)
)
PRIVATE FUEL STORAGE LLC)
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(Independent Spent)
Fuel Storage Installation))

Docket No. 72-22-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S MOTION FOR PROTECTIVE ORDER, AND RESPONSE TO 'STATE OF UTAH'S MOTION TO COMPEL NRC STAFF TO RESPOND TO STATE'S FIFTH SET OF DISCOVERY REQUESTS (CONTENTION E)'" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the Nuclear Regulatory Commission's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the United States mail, first class, as indicated by double asterisk, with copies by electronic mail as indicated, this 29th day of February, 2000.

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