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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Office of the
Secretary
Atomic Safety and
Licensing Board

In the Matter of:)	Docket No. 72-22-ISFSI
)	
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	February 22, 2000

**STATE OF UTAH'S MOTION TO COMPEL NRC STAFF TO RESPOND TO
STATE'S FIFTH AND SIXTH SET OF DISCOVERY REQUESTS
(CONTENTION L)**

Pursuant to 10 C.F.R. §§ 2.720(h)(2), 2.742, 2.744, and 2.790, the State of Utah hereby moves the Board to compel the Staff to answer certain discovery requests propounded in State of Utah's Fifth Set of Discovery Requests Directed to the NRC Staff (January 31, 2000) (hereinafter "State's Fifth Discovery Requests") and State of Utah's Sixth Set of Discovery Requests Directed to the NRC Staff (February 4, 2000) (hereinafter "State's Sixth Discovery Requests"). This motion relates only to Utah Contention L. The Staff's inadequate discovery responses relating to Contentions E and H are addressed in the State's other motions to compel filed today.

FACTUAL BACKGROUND

The State submitted its Fifth Discovery Requests on January 31, 2000 (State's Fifth Requests) and its Sixth Discovery Requests on February 4, 2000. On February 14, 2000, the Staff responded in NRC Staff's Objections and Responses to the 'State of Utah's Fifth Set of Discovery Requests Direct to the NRC Staff (Utah Contentions E, H,

D503

and L)' (hereinafter Staff Response Fifth Set) and NRC Staff's Objections and Responses to the 'State of Utah's Sixth Set of Discovery Requests Direct to the NRC Staff (Utah Contention L)' (hereinafter Staff Response Sixth Set). For convenience, the disputed requests and responses are set out in Exhibit 1.

The State contacted counsel for the Staff to discuss its discovery responses with respect to Contention L. Subsequently, in a February 17, 2000 e-mail from State's counsel to Staff's counsel, attached hereto as Exhibit 2, the State identified its concerns with the Staff's response to Contention L discovery requests. Attorneys for the State and Staff could not resolve their disagreement.

ARGUMENT

I. The Standard for Discovery Against the Staff for Requests for Admissions Is on the Same Footing as For Any Other Party and Is One of Broad Relevance.

The State has authority to seek requests for admission under 10 CFR § 2.742.

While the State understands that discovery against the Staff is often on a different footing than discovery against other parties, this is not the case with requests for admissions.

Georgia Power Co. (Vogle Electric Generating Plant, Units 1 and 2), LBP-94-26, 40 NRC 93, 95-96 (1994). Neither 10 CFR § 2.742 nor any other NRC regulation provides for any different treatment of the Staff. *Cf* 10 CFR § 2.742 and the special provisions for discovery against the Staff in §§ 2.720(h), 2.740(f)(3), 3.740a(j), 2.741(e), 2.744 and 2.790.

Unless otherwise determined by the Presiding Officer, discovery extends to "any

matter, not privileged, which is relevant to the subject matter involved in the proceeding.”

10 C.F.R. § 2.740(b)(1). The Commission gives its discovery rules the same “broad and liberal treatment” that is given to the discovery rules of the U.S. Federal Courts.

Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 461-62 (1974). Discovery is considered relevant unless it is “palpable that the evidence sought can have no possible bearing upon the issues.” Id. at 462, *quoting Hercules Powder Co. v. Rohn & Haas Co.*, 3 F.R.D. 302, 304 (D. Del. 1943). A motion to compel need not seek information which would be admissible *per se* in an adjudicatory proceeding, and need only request information which “reasonably could lead to obtaining [admissible] evidence.” Safety Light Corp. (Bloomsburg Site Decontamination), LBP-92-3A, 35 NRC 110, 111-12 (1992); *see also*, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-102, 16 NRC 1597, 1601 (1982); Commonwealth Edison, *supra*, 7 AEC at 462.

II. The Discovery Sought by the State Is Appropriate and Staff’s Responses Should Be Compelled

The State's discovery propounded on the Staff was prompted by issuance of the Staff's Safety Evaluation Report ("SER"), specifically § 2.1.6, Geology and Seismicity. In the SER the Staff found acceptable the use of a probabilistic seismic hazard analysis and a 2,000 year return period. SER at 2-45. In essence, the Staff granted the Applicant's request for an exemption from 10 CFR § 72.102, which requires the use of deterministic seismic hazard analysis. Furthermore, the Staff has now disclosed that the Applicant

cannot meet the requirements of 10 CFR § 72.102. Staff's Response to Late-Filed Bases for Utah Contention L at 2. Thus, the State's discovery is relevant to what methodology and standards the Staff will permit the Applicant to employ to meet the requirements of 10 CFR § 72.102, Geological and seismological characteristics. Furthermore, the requested discovery is necessary to assist the State in developing its case for hearing.

In addition, the Staff has complained in nearly every instance about the State's requests being vague and ambiguous, and impermissibly compound. These appear to be boilerplate responses, not responses reserved for specific requests about which the Staff has concerns. There is no merit in these objections. The requests and interrogatories speak for themselves; in every instance they are clear and not compound. Further, the Staff's boilerplate language does not come close to meeting its burden to make objections that are "plain enough and specific enough so that the court can understand in what way the interrogatories are claimed to be objectionable." Duke Power Company, (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1944 (1982).

A) State's Fifth Request, Document Request No. 4 - Utah L

The Staff objected to this Request for copies of cask stability analyses relied upon by the Staff to support its justification of the Applicant's seismic exemption request, contending that the State did not demonstrate the requested information could not be obtained from any other source, and that the request mischaracterized the Staff's position concerning Applicant's seismic exemption request. Staff's Response Fifth Set at 19.

The inapplicability of the Staff's first objection is apparent from the face of the

Request. The State requested copies of analyses *relied upon by the Staff*. Although the analyses themselves may be obtained from other sources, only the Staff can know the identity of the analyses it used. The State is not requesting copies of documents that are publicly available, but is requesting sufficient information to allow it to obtain those documents.

With respect to the Staff's claim of mischaracterization, if the Staff has not yet granted the Applicant's seismic exemption request, it has indicated that the Applicant's proposed methodology is acceptable. SER at 2-45. Any mischaracterization by the State should therefore not prevent the Staff from comprehending and responding to the Request.

As described above, the Staff also complained that the Request was vague and impermissibly compound, complaints that are not justified by the language in the State's Request. The relevance and necessity of this Request are further described in the opening paragraph of this Part II.

B) State's Sixth Request, Requests for Admission Nos. 10, 11, and 12

The Staff objected to these admission requests on the basis that the State failed to show why it could not obtain the requested information from other sources, including the referenced document. In the SER, the Staff approved the use of a return period of 2,000 years and justified the use of that standard based on a superseded version of a seismic building code. *See* SER at 2-45. The State made these requests for admission because it has determined, based on its own analysis, that there is no basis in the Rulemaking Plan

for the Staff's apparent determination to use design earthquakes with ground motions having a return period of 2,000 years (Request for Admission No. 10), that there is no basis for using a superseded version of seismic building codes (Request for Admission No. 11), and that there is no basis for using a seismic building code, designed to protect people, to evaluate the adequacy of a high-level nuclear waste storage facility. It is reasonable for the State to use its opportunity for discovery to attempt to determine the source of this difference of opinion between the Staff and the State. It has used these requests for admission to better understand the Staff's position. The State is not asking for a copy of the referenced documents but is asking about the Staff's understanding of the intended use of those documents. Responses to these requests are relevant to the State's understanding of the position the Staff has taken in the SER. The State has therefore made reasonable requests to the Staff to agree or disagree with these assertions.

The Staff also objects to Requests for Admission Nos. 11 and 12 on the grounds that the requests mischaracterize Building Seismic Safety Council documents as "building codes." This objection is groundless. Regardless of the State's characterization of the referenced documents as "building codes," the documents themselves are unequivocally defined in Request for Admission No. 11. Referring to the documents as building codes for convenience does not in any way make it more difficult for the Staff to answer the requests.

As described above, the Staff also complained that the requests were vague and impermissibly compound, complaints that are not justified by the language in the State's

Request. The relevance and necessity of these requests are further described in the opening paragraph of this Part II.

C) State's Sixth Request, Requests for Admission Nos. 13, 14, 15, and 16

The Staff refused to answer any of Requests for Admission Nos. 13, 14, 15, or 16 - Utah L, regarding whether exceedance of vibratory ground motions under described circumstances and cask tipover should be considered credible events, based solely on the grounds that the requests were vague and ambiguous, and impermissibly compound. These Requests for Admission address extremely technical subjects with which the Staff should be familiar, and the Staff's responses should be viewed in that context. In each of the Requests for Admission, the State describes in detail the event in question, so the event is not vague or ambiguous. Each request poses only one scenario, and is not in any way a compound question; the requests speak for themselves.

The relevance and necessity of these requests are further described in the opening paragraph of this Part II.

D) State's Sixth Request, Interrogatories No. 3 and 4

The Staff refused to answer Interrogatories Nos. 3 (regarding an acceptable means for determining if the design basis ground motions had been exceeded) and 4 (regarding the mitigation of cask tipover) solely on the grounds that the requests are vague and ambiguous and impermissibly compound. Staff Response Sixth Set at 13. The interrogatories speak for themselves; they are not in any way vague and ambiguous, and they are not compound. The relevance and necessity of these Interrogatories are further

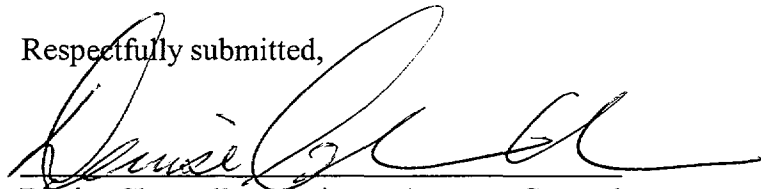
described in the opening paragraph of this Part II.

CONCLUSION

For the foregoing reasons, the Staff's objections to not responding to the State's Fifth and Sixth sets of discovery requests for Contention L, as described above, are without merit. Therefore, the Staff should be ordered to answer the above described Requests.

DATED this 22nd day of February, 2000.

Respectfully submitted,

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

Denise Chancellor, Assistant Attorney General

Fred G Nelson, Assistant Attorney General

Connie Nakahara, Special Assistant Attorney General

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CERTIFICATE OF SERVICE

MAR 1
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I hereby certify that a copy of STATE OF UTAH'S MOTION TO COMPEL
STAFF TO RESPOND TO STATE'S FIFTH AND SIXTH SETS OF DISCOVERY
REQUESTS (CONTENTION L) was served on the persons listed below by electronic
mail (unless otherwise noted) with conforming copies by United States mail first class,
this 22nd day of February, 2000:

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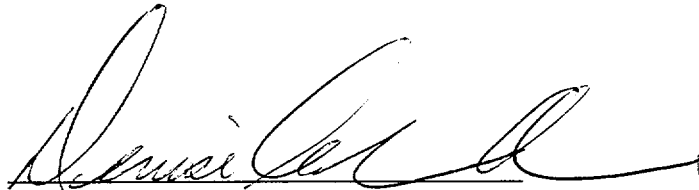
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Denise Chancellor
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State of Utah

EXHIBIT 1

DISPUTED REQUEST AND RESPONSE FOR STATE OF UTAH MOTION TO COMPEL NRC STAFF TO RESPOND TO STATE'S FIFTH AND SIXTH SET OF DISCOVERY REQUESTS (CONTENTION L)

Fifth Set Discovery Request (January 31, 2000) and Responses (February 14, 2000)

Document Request No. 4 - Utah L:

To the extent the Staff is relying on the specific cask stability analyses to support its justification of the Applicant's seismic exemption request conditioned on using a 2,000 year return period interval, please produce copies of those analyses for cask tipover. These document(s) may be directly relevant to the Staff's justification for granting the Applicant's seismic exemption request conditional on using a 2,000 year return period interval. According to the State's knowledge, these documents are not exempt from disclosure under 10 C.F.R. § 2.790.

State of Utah's Fifth Set of Discovery Requests Directed to the NRC Staff at 14-15.

Staff Response to Document Request No. 4 - Utah L:

The Staff objects to this request on the grounds that (a) it is vague and ambiguous, in that it does not identify "the specific cask stability analyses" that are referred to in the request, (b) it constitutes an impermissible compound question, (c) it mischaracterizes the Staff's position concerning the Applicant's seismic exemption request, as set forth in the Staff's SER for the PFS facility, and (d) the State has not demonstrated that the requested information could not be obtained from another source. *See* 10 C.F.R. § 2.740(b)(1).

NRC Staff's Objections and Responses to the 'State of Utah's Fifth Set of Discovery Requests Direct to the NRC Staff (Utah Contentions E, H, and L) at 19.

Sixth Set Discovery Request (February 4, 2000) and Responses (February 14, 2000)

Request for Admission No. 10 - Utah L:

Do you admit that the Rulemaking Plan, SECY-98-128, does not include the use of design earthquakes with ground motions having a return period of 2,000 years for dry cask storage at an ISFSI site?

State of Utah's Sixth Set of Discovery Requests Directed to the NRC Staff at 11.

Staff's response to Request for Admission No. 10 - Utah L:

See response to Request for Admission No. 5, *supra*. The Staff objects to this request on the grounds that the State has shown no reason why it could not obtain the requested information from other sources, including, without limitation, the referenced document, which speaks for itself.

NRC Staff's Objections and Responses to the 'State of Utah's Sixth Set of Discovery Requests Direct to the NRC Staff (Utah Contention L) at 10.

Request for Admission No. 11 - Utah L:

Do you admit that the standard of using peak ground motion values that have a 90-percent probability of not being exceeded in 50 years for the seismic design of structures, as recommended by the Uniform Building Code and the National Earthquake Hazards Reduction Program (International Conference of Building Officials, 1994; Building Seismic Safety Council, 1995) (collectively "Building Codes") and as cited by the Staff in the SER at 2-45, has been superseded by more stringent standards in later and/or pending versions of those Building Codes?

State Sixth Request at 11.

Staff Response to Request for Admission No. 11 - Utah L:

The Staff objects to this request on the grounds that (a) it is vague and ambiguous, (b) it constitutes an impermissible compound question, (c) it mischaracterizes the Building Seismic Safety Council document as a "building code," and (d) the State has shown no reason why it could not obtain the requested information from other sources, including, without limitation, the referenced documents, which speak for themselves.

Staff Sixth Response at 10.

Request for Admission No. 12 - Utah L:

Do you admit that the building-code standards for seismic safety cited by the Staff in the SER at 2-45 are intended to provide minimum life-safety standards for buildings and structures occupied by humans and are not intended for high-level nuclear waste storage facilities?

State Sixth Request at 11.

Staff Response to Request for Admission No. 12 - Utah L:

The Staff objects to this request on the grounds that (a) it is vague and ambiguous, (b) it constitutes an impermissible compound question, (c) it mischaracterizes the Building Seismic Safety Council document as a “building code,” and (d) the State has shown no reason why it could not obtain the requested information from other sources, including, without limitation, the referenced documents, which speak for themselves.

Staff Sixth Response at 11.

Request for Admission No. 13 - Utah L:

Do you admit that the occurrence of vibratory ground motions exceeding design basis ground motions with an estimated average return period of 1,000 years should be considered a credible event?

State Sixth Request at 11-12.

Staff Response to Request for Admission No. 13 - Utah L:

The Staff objects to this request on the grounds that it (a) is vague and ambiguous, and (b) constitutes an impermissible compound question.

Staff Sixth Response at 11.

Request for Admission No. 14 - Utah L:

Do you admit that the occurrence of vibratory ground motions exceeding design basis ground motions with an estimated average return period of 10,000 years should be considered a credible event?

State Sixth Request at 12.

Staff Response to Request for Admission No. 14 - Utah L:

The Staff objects to this request on the grounds that it (a) is vague and ambiguous, and (b) constitutes an impermissible compound question.

Staff Sixth Response at 11.

Request for Admission No. 15 - Utah :

Do you admit that the occurrence of vibratory ground motions exceeding design basis ground motions developed from 84th percentile deterministic ground motions should be considered a credible event?

State Sixth Request at 11.

Staff Response to Request for Admission No. 15 - Utah L:

The Staff objects to this request on the grounds that it (a) is vague and ambiguous, and (b) constitutes an impermissible compound question.

Staff Sixth Response at 11.

Request for Admission No. 16 - Utah L:

Do you admit that tipover of spent fuel storage casks at the proposed PFS ISFSI should be considered a credible event?

State Sixth Request at 12.

Staff Response to Request for Admission No. 16 - Utah L:

The Staff objects to this request on the grounds that it (a) is vague and ambiguous, and (b) constitutes an impermissible compound question.

Staff Sixth Response at 12.

Interrogatory No. 3 - Utah L:

If Requests for Admissions 13, 14, or 15 is admitted, please describe what the Staff would consider to be acceptable means for determining, in the aftermath of a seismic event, whether or not the design basis ground motions had been exceeded.

State Sixth Request at 13.

Staff Response to Interrogatory No. 3 - Utah L:

See Responses to Requests for Admission Nos. 13, 14 and 15, *supra*. The Staff objects to this request on the grounds that it (a) is vague and ambiguous, and (b) constitutes an impermissible compound question.

Staff Sixth Response at 13.

Interrogatory No. 4 - Utah L:

If Request for Admission No. 16 is admitted, please describe what the Staff would consider to be acceptable ways to mitigate the hazard of cask tipover.

State Sixth Request at 13.

Staff Response to Interrogatory No. 4 - Utah L:

See Response to Request for Admission No. 16, *supra*. The Staff objects to this request on the grounds that it (a) is vague and ambiguous, and (b) constitutes an impermissible compound question.

Staff Sixth Response at 13.

From: Denise Chancellor
To: turk
Date: 2/17/00 11:02AM
Subject: Staff Discovery Response to Contention L

Sherwin:

I have just received an email copy of the Staff's Feb. 14 responses to discovery (the one you sent today to Laura at Yahoo got through). We will follow up with our Information Tech. people to try to find out why your various attempts to email the discovery responses to all the people in the State system did not result in anyone (other than Diane Curran) receiving any of the emails.

I have quickly looked at your responses and wanted to give you a "heads up" before you leave in the next hour or so today on responses that may cause the State to file a Motion to Compel.

In general, the Requests for Admissions are not requesting documents but ask certain questions about NRC's use of documents that the Staff appears to rely on in the SER. Your objections that the State may get the information elsewhere does not appear to be responsive. Below are the specific concerns:

Staff's Response to State's 6th Set of Discovery

Requests for Admissions 6 through 8, and 10 (Rulemaking Plan).
Requests for Admissions 11 and 12 ("building codes")
Requests for Admissions 13 through 16 (credible events)

Interrogatory No. 3 & 4 (refers back to Admissions 13 thru 16).

Staff's Response to State's 5th Set:

I was pleased to see that you will produce the Stamatakos et al report and the other CNWRA report for Three Mile Island.

Only one complaint, Document Request No. 4. The State is requesting whatever the Staff is relying upon, therefore, your objection that we did not identify the specific analysis does not follow.

This quick email is an attempt to get some of the issues to you before you leave today. I will also send a copy of any other correspondence to Cathy Marco but I note that neither of you will be in on Friday. I will talk with you on Tuesday before filing any Motion to Compel.

Diane Curran is dealing with the Staff's response to Contention H. I cannot get you anything within the next hour (before you leave the office) on Contention E. You will have something waiting for you on your return on Tuesday.

Enjoy the long weekend!

Denise.

CC: inet: "clm@nrc.gov"