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February 9, 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-ISFSI
	)	
(Private Fuel Storage Facility)	)	

APPLICANT'S RESPONSE TO STATE OF UTAH'S REQUEST FOR ADMISSION OF LATE-FILED BASES FOR UTAH CONTENTION S

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby responds to the "State of Utah's Request for Admission of Late-Filed Bases for Utah Contention S," filed January 26, 2000. ("State Req."). The State's Request should be denied, first, for failing to meet the requirements for late-filed contentions and second, for failing to meet the Commission's contentions requirements. 10 C.F.R. § 2.714.

I. BACKGROUND

Utah Contention S ("Utah S"), admitted in April 1998, challenges the adequacy of PFS's decommissioning plan and decommissioning funding plan for the Private Fuel Storage Facility ("PFSF"). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) LBP-98-7, 47 NRC 142, 255 (1998). In early January 2000, the NRC Staff issued a corrected Safety Evaluation Report ("SER") for the PFSF that, inter alia, found that PFS's decommissioning funding plan provided "reasonable assurance that decontamination and decommissioning at the end of Facility operations will provide adequate protection of the public health and safety and satisfies 10 CFR 72.30(c)." On January 26,

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2000, the State filed its request to admit two late-filed bases for Utah S, which challenge PFS's decommissioning funding plan.[1]

II. DISCUSSION

The State's request for admission of late-filed bases for Utah S should be denied because it does not satisfy the requirements for the late-filing of contentions, 10 C.F.R. § 2.714(a)(1) and because it does not satisfy the Commission's requirements for the admission of timely contentions, 10 C.F.R. § 2.714(b)(2).

A. Unjustifiably Late Request for Admission of Contentions

The State's request to admit late-filed bases for Contention Utah S must be denied because it is unjustifiably late. Late-filed contentions or new bases to admitted contentions must pass the five-factor test of 10 C.F.R. § 2.714(a)(1).[2]

The State's request to admit late-filed bases for Utah S must be denied because the State lacks good cause for its lateness. Both Bases 12 and 13 assertedly challenge "[t]he Staff's proposed acceptance of the Applicant's proposal to require payment of decommissioning costs at the time a cask is accepted for storage rather than before the start of operations . . . ." State Req. at 3 (citation omitted). While the State couches its late bases as challenges to the "Staff's proposed acceptance . . . of the Applicant's proposal," the appropriate challenge is to "the Applicant's proposal"—PFS's decommissioning funding plan—and that challenge is impermissibly late. The Commission has clearly stated:

> Apart from NEPA issues, which are specifically dealt with in the rule, a contention will not be admitted if the allegation is that the NRC staff has

[1] These bases are quoted in full in Attachment A.

[2] LBP-98-7, 47 NRC at 182-83; Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 255 & n.15 (1996) (late-filed basis).

> not performed an adequate analysis. . . . [T]he sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC staff performance. . . . [W]e reject . . . suggestions that intervenors not be required to set forth pertinent facts until the staff has published its FES and SER.[3]

54 Fed. Reg, 33,168, 33,171 (1989) (Statement of Considerations for "Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process").

PFS first set forth its decommissioning funding plan, in which it proposed to fund decommissioning for each spent fuel storage cask prior to its acceptance at the PFSF, in its license application two and a half years ago. PFSF License Application ("LA"), App. B § 5.1 ("Storage Cask Decommissioning Funding Plan"):[4]

> The service agreement with each customer (reactor) shall require at least $17,000 to be deposited into an externalized escrow account prior to shipment of each spent fuel canister to the PFSF. The full amount of potential decommissioning costs will thus be collected in a segregated account prior to the receipt of each spent fuel canister at the PFSF. This method of funding provides for the prepayment of the storage cask decommissioning costs prior to any potential exposure of the storage cask to radiation or radioactive material, and therefore prior to the need for any decommissioning. This funding method complies with the requirements of 10 CFR 72.30(c)(1).

Therefore, the proper object of the State's challenge should have been PFS's License Application, not the Staff's SER. Thus, the State's request is unjustifiably late and should be denied.[5]

Good cause is the preeminent requirement of section 2.714(a)(1) and failure to meet it "mandates a compelling showing in connection with the other four factors" to

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[3] See Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048-49 (1983) (safety-related contentions must be filed on the basis of the applicant's SAR, not the Staff's subsequently issued SER).

[4] See also LA at 1-7.

[5] See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) LBP-99-3, 49 NRC 40, 47 (1999) (establishing 45 days as "approaching the outer boundary of 'good cause'").

obtain the admission of a late contention. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 293 (1998). The State fails to make such a compelling showing. First, the State fails to show that it would contribute to the sound development of the record (factor three), in that its expert affidavit it filed with its request does not "with as much particularity as possible . . . summarize [the expert's] proposed testimony" on the new bases. LBP-98-7, 47 NRC at 208. The State includes barely two paragraphs of conclusory allegations in its request, see State Req. at 7, which the State's expert cites and then goes on to assert that he is "prepared to provide expert testimony regarding these matters." See Sheehan Dec. at ¶¶ 7-8 (January 26, 2000). Such "minimal information" does not satisfy factor three. See LBP-98-7, 47 NRC at 208-09; LBP-98-29, 48 NRC at 294. Second, admitting the State's bases would broaden and, at this date, delay the proceeding (factor five). Admission of new bases will by definition broaden the proceeding and at this date, after the close of discovery on Utah S prior to the hearing, will delay it as well. See South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 888-89 (1981).

The other factors relating to the protection of the State's interest (two and four) are accorded less weight than factors three and five (and much less than good cause, factor one). LBP-98-29, 48 NRC at 294. Therefore, lacking good cause, the State fails to make a compelling showing on the other four late-filing factors and hence its request for the admission of late-filed bases for Utah S must be denied.

B. Failure to Meet Requirements for Admitting Timely Contentions

The State's two late-filed bases are inadmissible because they do not show that a genuine dispute exists with the applicant on a material issue of law or fact, 10 C.F.R. §

2.714(b)(2)(iii). In the alternative, the bases are inadmissible in that even if proven, the bases would be of no consequence in the proceeding because they would not entitle the State to relief, 10 C.F.R. § 2.714(d)(2)(ii).

1. The Late Bases Do Not Raise a Genuine Dispute with the Applicant

The State's late bases for Utah S fail to raise a genuine dispute with the applicant, 10 C.F.R. § 2.714(b)(2)(iii), in that they attempt to force an illogical interpretation of the Commission's ISFSI decommissioning funding rules on the NRC and PFS. Therefore, the State's bases constitute a collateral attack on the Commission's regulations and cannot be admitted. LBP-98-7, 47 NRC at 179.

In late Basis 12, the State asserts that "the Staff's proposed acceptance" of PFS's plan to pay decommissioning costs for each cask at the time the cask is accepted for storage violates 10 C.F.R. § 72.30(c)(1), arguing the regulation requires that, for the prepayment option that PFS has chosen, PFS must deposit, prior to the start of facility operation funds sufficient to pay for the decommissioning of all the casks that PFS will store at the PFSF. State Req. at 3-4.

The prepayment provision of 10 C.F.R. § 72.30(c)(1) reads, in pertinent part: "Prepayment is the deposit prior to the start of operation into an account . . . of cash or liquid assets . . . sufficient to pay decommissioning costs." PFS's method will provide for prepayment sufficient to pay the decommissioning costs of each cask before that cask goes into operation. Thus, PFS's methodology meets the regulatory requirement.[6]

[6] Note that decommissioning funding for the PFS facility and site outside of the casks is not at issue here; PFS will fund such decommissioning via a letter of credit coupled with an external sinking fund and hence will have funding committed for the entire amount before operation of the PFSF begins. LA App. B at 5-1.

In construing statutes and regulations, "absurd results are to be avoided." United States v. Turkette, 452 U.S. 576, 580 (1981).[7] Thus, the State's construction of section 72.30(c)(1) must be rejected. PFS has applied for a license to store up to approximately 4,000 spent fuel casks at the PFSF. LA at 3-1. If the PFSF were to receive 4,000 casks, they would arrive over a 20 year period, at a rate of approximately 200 casks per year. E.g., PFSF SAR at 7.3-10. Under the State's interpretation of section 72.30(c)(1), however, PFS would have to pay decommissioning costs before the PFSF became operational for the first cask as well as the 4,000th cask, even though the first cask could arrive the day operation commences, while the 4,000th cask would not arrive and could not be contaminated—indeed would not exist—until 20 years later. It is simply an absurd result for the regulation, as construed by the State, to allow PFS to pay decommissioning costs for the first cask one day before it arrives on site but require PFS to pay decommissioning costs for the 4,000th cask some 20 years before it arrives.

Furthermore, the absurdity of the State's construction would require PFS to pay decommissioning costs for casks that PFS might never use and hence might never exist. While PFS is applying for a license to store up to 4,000 casks, it has not committed nor is it required to commit to storing the entire 4,000.[8] If PFS never stored the maximum 4,000 casks, the State's reading of 72.30(c)(1) would nevertheless force PFS to pay decommissioning costs up front for all of them, i.e., paying to decommission things that

[7] "When [the plain meaning of the words of a statute] has led to absurd or futile results, . . . this Court has looked beyond the words to the purpose of the act." United States v. American Trucking Ass'n, 310 U.S. 534, 543-44 (1940).

[8] See LA at 1-5 to 1-6; Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (December 3, 1999) [hereinafter "PFS Utah E Mot."], at 7-8 (PFS's financial commitments will ensure PFS's financial qualifications even if PFS stores fewer than 4,000 casks).

would never exist. This is a result the Commission cannot have intended. Therefore, the State's argument simply cannot stand and Basis 12 must be dismissed.

The proper construction of the prepayment provision of 10 C.F.R. § 72.30(c)(1), which requires "deposit prior to the start of operation . . . of cash or liquid assets . . . sufficient to pay decommissioning costs," is to read "operation" to be the operation of the spent fuel storage cask. The intent of 72.30(c)(1) is to provide "reasonable assurance . . . that funds will be available to decommission the ISFSI . . . ." 10 C.F.R. § 72.30(b). Such a reading would enable applicants to comply with the regulation reasonably and would produce the specific result intended by the regulation of which 72.30(c)(1) is a part. As PFS states in its license application, quoted above: "[PFS's] method of funding provides for the prepayment of the storage cask decommissioning costs prior to any potential exposure of the storage cask to radiation or radioactive material, and therefore prior to the need for any decommissioning." LA, App. B § 5.1. Thus, in accordance with section 72.30(b), it guarantees that funding will be available to decommission all the casks at the PFSF, without absurdly requiring prepayment for a cask that would come into existence only 20 years hence or perhaps not at all. Therefore, the State's construction of section 72.30(c)(1) in Basis 12 is a collateral attack on the regulation and it cannot serve as a basis for an admissible contention. Thus, the State's request must be denied.

The State's unsupported allegations as to the accuracy of PFS's decommissioning cost estimates and the potential for cost escalation, see State Req. at 6, do not provide a basis for the granting of the State's request. Contentions regarding decommissioning funding must show that the alleged deficiency in the plan "has some independent health and safety significance." Yankee Atomic Electric Company (Yankee Nuclear Power

Station), CLI-96-7, 43 NRC 235, 256 (1996). Furthermore, even if the contention concerns issues that do have health and safety significance, it must allege more than mere uncertainty. Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 8 (1996). Here, the State alleges no health and safety significance whatsoever. See State Req. at 5-6. Its only claim is that PFS's cost estimates are allegedly "based on a best case scenario" and that "there will be an escalation of estimated decommissioning costs as time goes on." Id. Such is the mere uncertainty that cannot support a decommissioning funding contention. Moreover, the State ignores PFS's decommissioning plan, which states: "The escrow amount will be reviewed and adjusted annually for inflation and any changes in the scope or cost of decommissioning." LA at 10-2 (emphasis added). "[A] contention that . . . mistakenly asserts the application does not address a relevant issue is subject to dismissal." LBP-98-7, 47 NRC at 181. Even more, the State's allegations of uncertainty have no factual support. This Board has held that "an expert opinion that merely states a conclusion . . . without providing a reasoned basis or explanation for that conclusion is inadequate . . . [for the admission of a contention]" LBP-98-7, 47 NRC at 181.[9] The State and its expert provide no more than that here. Thus, the State's allegations cannot support its request for the admission of Bases 12 and 13 and in fact there is no basis for the State's argument that PFS cannot safely fund the decommissioning of its spent fuel storage casks prior to receiving each cask at the PFSF.[10]

[9] See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 150-51 (1993) (expert opinion lacking supporting documentation or data is insufficient).

[10] Indeed, the State's argument that uncertainty would threaten PFS's cost estimates if it were to wait to fund cask decommissioning simply makes no sense. Uncertainty will only decrease as payments are made closer to the actual time of decommissioning. Cf. Yankee Nuclear, CLI-96-1, 43 NRC at 8 (citing unavoidable uncertainties associated with decommissioning 30 or more years into the future).

Finally, if section 72.30(c)(1) is read to require prepayment before operation of spent fuel storage casks, as it reasonably should be, then PFS's decommissioning funding plan is in compliance with both the letter and the spirit of the regulation and no exemption or waiver is needed. See 10 C.F.R. §§ 72.7, 2.758. In that case, Utah S Basis 13 must be dismissed for failing to show the existence of a genuine dispute with the applicant on a material issue of fact or law, 10 C.F.R. § 2.714(b)(2)(iii), in that PFS has not requested and does not need an exemption or waiver.

2. The Late Bases Would Not Entitle the State to Relief

In the alternative, the State's late Bases 12 and 13 for Utah S should be dismissed because they would not entitle the State to relief even if proven. 10 C.F.R. § 2.714(d)(2)(ii). Even if PFS's decommissioning funding plan for its spent fuel storage casks were read to violate 10 C.F.R. § 72.30(c)(1) as the State's argues, the PFS plan would provide reasonable assurance of the availability of funds to decommission the PFSF and would provide adequate protection of the public health and safety. Thus, it would satisfy the intent of section 72.30(c)(1) and the Commission's decommissioning funding regulations as a whole. Therefore, PFS would, as the NRC Staff suggests, SER at 17-5 and –6, be entitled to an exemption from the literal requirements of section 72.30(c)(1). In that case, the State's Bases 12 and 13, even if admitted, would entitle it to no relief, in that PFS's decommissioning funding plan would remain absolutely unchanged after the granting of the exemption.[11]

[11] The case cited by the State, State Req. at 5, Gulf States Utilities Company (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 473 (1995), is inapposite, in that 1) PFS is not asking the Board for an exemption and 2) if PFS were to request an exemption from the Staff, the exemption would not, as PFS has explained, circumvent the Commission's decommissioning funding rules.

"The Commission may, upon application by any interested person or upon its own initiative, grant such exemptions . . . as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest." 10 C.F.R. § 72.7. If section 72.30(c)(1) was not interpreted to pertain to operation of a spent fuel storage cask, as PFS believes is correct, an exemption from the rule would be warranted in that, as set forth above, the PFS cask decommissioning funding plan would provide reasonable assurance of the availability of funds to decommission the PFSF and would provide adequate protection of the public health and safety. Therefore, because PFS would be entitled to an exemption from the requirements of section 72.30(c)(1) even if they were read as the State argues, PFS would not have to amend its cask decommissioning funding plan and the State would be entitled to no relief, even if Bases 12 and 13 were admitted. 10 C.F.R. § 2.714(d)(2)(ii). Therefore the State's request should be denied.

III. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Board deny Utah's request to admit its late-filed bases for Contention Utah S.

Respectfully submitted,

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ATTACHMENT A

STATE OF UTAH LATE-FILED BASES FOR UTAH CONTENTION S

Basis 12: The Staff's proposed acceptance (SER at 17-5, -6) of the Applicant's proposal to require payment of decommissioning costs at the time a cask is accepted for storage rather than before the start of operations is in violation of the requirements of 10 CFR § 72.30(c)(1).

Basis 13: The Staff's proposed acceptance (SER at 17-5, -6) of the Applicant's proposal to require payment of decommissioning costs at the time a cask is accepted for storage rather than before the start of operations improperly grants to the Applicant an exemption to 10 CFR § 72.30(c)(1), without a request by the Applicant and without meeting the standards for exemption under 10 CFR § 72.7 or the standards for rule waiver under 10 CFR 2.758.

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
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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 Response to State of Utah's Request for Admission of Late-Filed Bases for Utah Contention S" and Attachment A were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 9th day of February 2000.

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