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April 17, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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 BRIEF ON THE REFERRAL OF THE GRANT OF PARTIAL SUMMARY DISPOSITION OF UTAH CONTENTION E/CONFEDERATED TRIBES CONTENTION F

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Pursuant to the Commission's Order of March 24, 2000, Applicant Private Fuel Storage, L.L.C. ("Applicant" or "PFS") submits this brief on the referral by the Atomic Safety and Licensing Board ("Board") of its March 10, 2000 Memorandum and Order granting in part PFS's motion for partial summary disposition of Utah Contention E/Confederated Tribes Contention F ("Utah E"), concerning PFS's financial qualifications to build and operate an independent spent fuel storage installation (ISFSI).[1] The Board relied on the Commission's decision in Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997) ["LES"] in finding that the financial assurance requirements of 10 C.F.R. § 72.22(e) are met by license conditions prohibiting the licensee from beginning construction or operation before it has sufficient funding to cover necessary costs. PFS does not believe that the Board's decision warrants interlocutory review, but if the Commission reviews it, it should be affirmed.

[1] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-6, slip op. at 70-72 (2000).

I. BACKGROUND

An ISFSI license applicant must show that it has reasonable assurance of obtaining funds to cover the estimated construction costs and operating costs over the planned life of the facility. 10 C.F.R. § 72.22(e). PFS has provided this assurance for the proposed Private Fuel Storage Facility ("PFSF") by making the following commitments:

> PFS will not commence ISFSI construction unless and until it has committed funds sufficient to provide fully for the construction of an ISFSI (including PFS's administrative and operational costs during construction of the project) with [a specified minimum capacity],[2] whether these funds are obtained through equity contributions, through Service Agreements [between PFS and its customers], or through other committed forms of financing . . . .
>
> PFS will not commence operations of the PFSF, and will not accept spent nuclear fuel for storage at the PFSF, unless PFS has in place long term Service Agreements for spent fuel storage services with its members and customers sufficient to cover the costs of operating and maintaining the facility with respect to the spent fuel to be accepted and stored under the contracts. The costs for storage of additional spent fuel at the PFSF (beyond that contracted for under the initial Service Agreements at the commencement of operations) will [similarly] be covered by long term Service Agreements for spent fuel storage services with PFS's members and customers. The costs of any additional construction necessary to enable the storage of additional spent nuclear fuel at the PFSF will be funded through equity contributions, the Service Agreements, or other forms of committed financing . . . .[3]

PFS's commitments will ensure the protection of the public from harms that might arise from hypothetical PFS financial difficulties. If PFS does not obtain sufficient committed funding to cover construction costs, the PFSF will not be built. If PFS does not enter into Service Agreements sufficient to cover operation and maintenance costs, the PFSF will

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[2] The minimum capacity of the PFSF is PFS proprietary information, LBP-00-6, slip op. at 12 n.1.

[3] Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (December 3, 1999) ["PFS Utah E Mot."], Declaration of John Parkyn (Dec. 2, 1999) ["Parkyn Dec."] at 2-3, quoted in LBP-00-6, slip op. at 12-13.

not operate. PFS Utah E Mot. at 9-10. The NRC Staff proposed license conditions that would bind PFS to its commitments, PFSF SER[4] at 17-4, quoted in LBP-00-6, slip op. at 14-15, which the Board imposed on PFS in its ruling. Id. at 72-73.

The Board in its ruling also recognized additional commitments made by PFS to provide further financial assurance, these being:

1. PFS will not voluntarily terminate prior to providing all spent fuel storage services pursuant to its customer Service Agreements, completing its licensing and regulatory obligations, and terminating the license for the PFSF;
2. PFS will assign financial and legal responsibility for the spent fuel between PFS and the customer, which shall remain titleholder to the fuel;
3. Customers will periodically provide pertinent financial information to PFS, will meet creditworthiness standards, and will provide additional financial assurances to PFS as necessary; and
4. PFS will obtain off-site nuclear liability insurance in the amount of $200 million, i.e., the largest commercially available amount for the PFSF.

Id.; see PFS Utah E Mot. at 17-18; Parkyn Dec. at 6, 8, 11.

Utah E challenges 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).[5] PFS sought summary disposition of all of Utah E except for

[4] Safety Evaluation Report of the Site-Related Aspects of the Private Fuel Storage Facility Independent Spent Fuel Storage Installation (Jan. 4, 2000). These conditions paraphrase PFS's commitments and are in substance the same.

[5] The record contains numerous pleadings concerning PFS's financial qualifications as related to PFS's motion. NRC Staff's Response to Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (December 22, 1999); State of Utah's Response to the Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (December 27, 1999); State of Utah's Reply to the Staff's Response to the Applicant's Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes Contention F (January 10, 2000); State of Utah's Request for Admission of Late-Filed Bases for Utah Contention E (January 26, 2000); Applicant's Response to State of Utah's Request for Admission of Late-Filed Bases for Utah Contention E (February 4, 2000); NRC Staff's Response to State of Utah's Request for Admission of Late-Filed Bases for Utah Contention E (February 4, 2000); State of Utah's Reply to Applicant's and NRC Staff's Responses to State of Utah's Request for Admission of Late-Filed Bases for Utah Contention E (February 11, 2000).

basis 6, the costs of building, operating, and maintaining the facility. PFS's motion argued that its financial commitments either rendered the bases of Utah E moot or satisfied them, or that the bases were legally groundless. The NRC Staff supported the motion but the State of Utah opposed it. Relying upon the Commission's LES decision, the Board (with one exception) rejected the State's arguments, concluding that PFS's commitments provided reasonable assurance that PFS would obtain the necessary funds. LBP-00-6, passim.[6] Except for the level of on-site property insurance, the Board granted PFS's motion. Id. at 73.

II. THE BOARD'S RULING DOES NOT WARRANT INTERLOCUTORY REVIEW

A. Standards for Granting Interlocutory Review

The Commission disfavors interlocutory review, and will undertake this extraordinary action only in the most compelling circumstances. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319, 321 (1994). As a general matter, NRC prohibits interlocutory review. See 10 C.F.R. § 2.730(f). Licensing boards may refer rulings to the Commission for consideration for possible interlocutory review. Id. However, for Commission review, there nevertheless must be a "clear and convincing showing"[7] that the ruling meets one of the Commission's threshold requirements, i.e., the ruling:

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[6] The cost estimate basis (on which summary disposition was not sought) and the property damage insurance basis (on which summary disposition was denied) are scheduled for adjudicatory hearing starting June 19, 2000.

[7] Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 (1983).

1. threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
2. affects the basic structure of the proceeding in a pervasive or unusual manner.

See 10 C.F.R. § 2.786(g). Rulings referred by licensing boards have been denied interlocutory review for failure to meet these criteria.[8] Thus, while the Commission has encouraged boards to refer rulings "involving novel issues" for consideration "early. . . in the proceeding," the Commission at the same time has clearly stated that it "will evaluate any matter put before it to ensure that interlocutory review is warranted."[9]

B. The Referred Ruling Does Not Meet Interlocutory Review Standards

The Board left for the Commission's determination whether that the standards for interlocutory review in 10 C.F.R. § 2.786(g) have been met. See LBP-00-6, slip op. at 71. For its part, the State addresses the standards for interlocutory review only in passing, providing no bases for its assertions.[10] The referred ruling does not meet either of the standards in 10 C.F.R. § 2.786(g). Because the exceptional circumstances required for interlocutory review are not present here, Commission review of the Board's Order "should await the rendition of an initial decision."[11]

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[8] See, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 994 (1984); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192-93 (1977).

[9] Statement of Policy on Conduct of Adjudicatory Proceedings CLI-98-12, 48 NRC 18, 23 (1998). The Board referred its ruling for Commission consideration in accordance with the Commission's Statement of Policy. LBP-00-06, slip op. at 70-72. The Board acknowledged that the Commission may choose to decline the referral after applying the interlocutory review standards established in Marble Hill, ALAB-405, supra, 5 NRC at 1193, and codified in 10 C.F.R. § 2.786(g). LBP-00-06, slip op. at 72. The Board did not include a showing of compliance with these standards in LBP-00-06. See id.

[10] See State of Utah's Brief to the Commission Regarding the Licensing Board's Grant of Summary Disposition of Bases Under Utah Contention E/Confederated Tribes Contention F (April 5, 2000) ["State Br."].

[11] Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 136 (1987).

1. Board's Ruling Does Not Meet the First Prong of 10 C.F.R. § 2.786(g)

The Board's ruling does not cause "immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the [Board's] final decision." 10 C.F.R. § 2.786(g)(1). Indeed, the State did not address this test. The serious irreparable harm test is not ordinarily met where a licensing board dismisses issues from further consideration in a proceeding.[12] Where there are other contentions pending in the proceeding, a board order dismissing a contention or its bases from further litigation has been found not to be "anything more than a routine interlocutory ruling not subject to immediate appellate review; such rulings must 'abide the end of the case.'" Private Fuel Storage L.L.C., CLI-00-2, slip op. at 3-4 (2000) (citation omitted). Nor are assertions of potential delay or increased expense attributable to a board's order sufficient to obtain interlocutory review.[13] Nothing here shows that Utah is threatened with any harm that could not be alleviated by an appeal to the Commission at the conclusion of this proceeding, and therefore the first prong of 10 C.F.R. § 2.786(g) is not met.[14]

2. Board's Ruling Does Not Meet the Second Prong of 10 C.F.R. § 2.786(g)

Nor does the Board's ruling meet the second prong: that the Board's ruling "[a]ffects the basic structure of the proceeding in a pervasive or unusual manner." 10 C.F.R. § 2.786(g)(2). The State alleges only that the Board's ruling will have a "pervasive and unusual impact on the proceeding." State Br. at 4 (emphasis added). The State ignores the requirement that the "basic structure" of the proceeding must be affected.

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[12] Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 592 (1986).

[13] Sequoyah Fuels Corp. (Gore, Okla. Site), CLI-94-11, 40 NRC 55, 61 (1994).

[14] See id. at 62.

Rather than addressing the "basic structure" test, the State instead asserts that the Board's ruling "denies the State its right to a hearing" and alleges that, absent interlocutory review, "the State will not have an opportunity to demonstrate that it is entitled to a hearing on this matter until after a license has been issued." State Br. at 4-5. The State's failure to address the "basic structure" test is fatal to its claim, for it is well established that "a licensing board decision rejecting or admitting particular issues for consideration does not in and of itself indicate that a proceeding will be affected in a pervasive or unusual manner." Vogtle, CLI-94-15, 40 NRC at 321 (rejecting interlocutory appeal of partial grant of summary disposition).[15] Nor is the basic structure changed "merely because an interlocutory Board ruling is incorrect, even when it conflicts with case law or Commission regulations." Id.[16] Finally, the basic structure of a proceeding is not changed simply because a board ruling is "undoubtedly significant" and "important."[17]

3. The Board's Ruling Does Not Merit Discretionary Interlocutory Review

The State also "suggests" that the Commission "should use its discretionary authority" to perform interlocutory review. State Br. at 5.[18] The State supports its "sug-

[15] See also Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93-94 (1994) (an incorrect interpretation of Commission regulations, where the board ultimately simply rejects particular issues for further consideration, has "not been adequate in practice to demonstrate that the structure of a proceeding has been affected in a pervasive or unusual way").

[16] See also Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities), CLI-95-3, 41 NRC 245, 246-47 (1995) (a legal error, standing alone, does not alter the basic structure of a proceeding and therefore does not justify interlocutory review).

[17] Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320 (1998) (Subpart L case applying 10 C.F.R. § 2.786(g) standards). See also Shoreham, ALAB-861, 25 NRC at 135 ("important or novel" not sufficient to affect basic structure of proceeding).

[18] The only case cited by the State for this proposition, Safety Light Corp. (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85 (1992), see State Br. at 5, does not support the State's position. In Safety Light, the board converted an informal Subpart L proceeding into a formal Subpart G proceeding. The Commission has characterized the Board's action as having "a pervasive effect on the structure of [the] proceedings." Private Fuel Storage, CLI-00-02, supra, slip op. at 3. Nothing of that sort has occurred here.

gest[ion]" with a misplaced reference to the Commission's statement that boards are "encouraged to certify novel legal or policy questions relating to admitted issues to the Commission as early as possible." State Br. at 5 (citing Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, supra, 48 NRC at 23). The Commission's policy statement, however, says nothing about discretionary review for rulings not meeting the standards for interlocutory review, and the State neglects the Policy Statement's conclusion that "[t]he Commission, however, will evaluate any matter put before it to ensure that interlocutory review is warranted." Id.

The State also asserts (without explanation or support) that the Commission should undertake discretionary review because the Board's ruling "is one of first impression" with "far-reaching impacts." State Br. at 5. The Board's ruling here is not a case of first impression. The Commission has already addressed the issue of reasonable financial assurance for non-Part 50 license applicants in LES,[19] and subsequently recommended that the LES holding be considered in this proceeding.[20] The State gives neither explanation nor example of the claimed "far-reaching impacts."[21]

Nor does past practice support the State. The handful of Appeal Board cases granting discretionary interlocutory review involved legal questions having immediate significant generic implications for numerous other license proceedings then under way or at the threshold of commencement, which questions had not been previously addressed

[19] LES, CLI-97-15, 46 NRC at 302, 308-09.

[20] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36 (1998).

[21] Nor should it be permitted to do so for the first time in its reply to this brief, thus depriving PFS the opportunity to address the State's claims.

on appeal.[22] Discretionary interlocutory review was held not justified where only two or three other ongoing license proceedings would be affected.[23] Here, no other ongoing licensing proceedings are affected.

In sum, the Board's ruling does not warrant interlocutory review, although PFS recognizes the Commission's authority to take such review.

III. SHOULD THE COMMISSION REVIEW THE BOARD'S RULING, IT SHOULD BE AFFIRMED

Should the Commission decide to review the Board's decision, it should affirm the decision as being in accordance with well established Commission precedent. The State argues that the Board's decision is erroneous in that (1) the Board misinterpreted and misapplied the Commission's financial qualification regulations, (2) the Board's decision improperly denies the State an adjudicatory hearing on material licensing issues, and (3) the Board's decision overlooks significant issues of material fact. As set forth below, the State's arguments lack merit and should be rejected.

A. The Board's Ruling is Correct and Should Be Affirmed

The Board's partial grant of PFS's motion for summary disposition was correct and should be affirmed.[24] A party is entitled to summary disposition if "there is no genuine issue as to any material fact and . . . the . . . party is entitled to a decision as a matter of law." 10 C.F.R. § 2.749(d).

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[22] Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-888, 27 NRC 257, 263-64 (1988); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 465 (1982).

[23] Virginia Electric Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 376-77 (1983).

[24] The standard of review of a grant of summary disposition is de novo. E.g., Cement and Concrete Workers Dist. Council Welfare Fund v. Lollo, 35 F.3d 29, 32 (2d Cir. 1994); see generally, Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 104-16 (1993). As an appellate tribunal, the Commission may affirm a grant of summary disposition on any grounds supported by the record. See Pfeil v. Rogers, 757 F.2d 850, 866 (7th Cir. 1985), cert. denied, 475 U.S. 1107 (1986).

> Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To counter a motion for summary disposition, an opponent "may not rest upon 'mere allegations or denials'" but must "present contrary evidence that is so significantly probative that it creates a material factual issue." Advanced Medical Systems, CLI-93-22, 38 NRC at 102 & n.13. Merely a "metaphysical doubt" concerning the material facts is insufficient. Id.

Based on the substantive law applicable to this case, the Board correctly determined that there were no genuine issues as to any material facts pertaining to the disposed issues in Utah E. The Board applied the LES decision in finding that there would be reasonable assurance that PFS would have sufficient funds to build and operate the PFSF (subject to the litigation of the costs of the facility), because license conditions would require PFS to have committed funding sufficient to cover construction costs before beginning construction and would require PFS to have customer Service Agreements sufficient to cover operation and maintenance costs before beginning operation. The Board's ruling was correct in that PFS's commitments and the license conditions that bind PFS to them provides reasonable assurance – the material licensing issue here – that PFS will have the funds to build and operate the PFSF and thus PFS satisfies the financial qualifications requirements of 10 C.F.R. Part 72.

An analysis of the financial qualifications requirements of Part 72 shows that they are satisfied by commitments like those made by PFS. An ISFSI license applicant must be "financially qualified to engage in the proposed activities in accordance with the regulations in this part." 10 C.F.R. § 72.40(a)(6). To demonstrate its financial qualifications, an applicant must show that:

> the applicant either possesses the necessary funds, or that applicant has reasonable assurance of obtaining the necessary funds, or that by a combination of the two, the applicant will have the necessary funds available to cover . . . [e]stimated construction costs [and] [e]stimated operating costs over the planned life of the ISFSI . . . .

10 C.F.R. § 72.22(e) (emphasis added).[25] Under the Commission's interpretations of its regulations as set forth in LES, PFS's commitments and the Board's license conditions ensure that PFS will have reasonable assurance of obtaining the necessary funds to cover facility construction and operating costs, in that if PFS does not have sufficient committed funding before construction there will be no facility, and if PFS does not have sufficient customer Service Agreements before operation the facility will not operate.

In LES, the Commission found that the applicant's financial strategy for a Part 70 license for a uranium enrichment facility, based on commitments very similar to PFS's, "provides reasonable assurance that financial difficulties, should they arise, will not lead to safety problems." CLI-97-15, 46 NRC at 307 (emphasis added). The Commission determined this despite the fact that, at the time of licensing, LES itself (like PFS) lacked the finances to build or operate the facility. Id. at 304. At the heart of the Commission's finding were the following facts.

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[25] As the Commission stated in North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 221-22 (1999), reasonable assurance, even under Part 50 regulations for reactors, is not an absolute guarantee:

> To be sure, safe operation of a nuclear plant requires adequate funding, but the potential safety impacts of a shortfall in funding are not so direct or immediate as the safety impacts of significant technical deficiencies. Generally speaking, then, the level of assurance the Commission finds it reasonable to require regarding a licensee's ability to meet financial obligations is less than the extremely high assurance the Commission requires regarding the safety of reactor design, construction, and operation. The Commission will accept financial assurances based on plausible assumptions and forecasts, even though the possibility is not insignificant that things will turn out less favorably than expected. Thus, the mere casting of doubt on some aspects of proposed funding plans is not by itself sufficient to defeat a finding of reasonable assurance.

- First, "[u]nder LES's financing plan construction will not even begin until the necessary funding is fully committed." Id. at 307. "In view of LES's reasonable construction cost estimate and its advance funding commitment, we see little or no risk that lack of financing might lead to construction of an unsafe plant." Id.

- Second, "operations will not begin until firm supply contracts with . . . customers are in place." Id. "If LES never begins operation, there is no risk whatever to public health and safety." Id. (emphasis added).

Thus, LES's commitment approach, very similar to that used by PFS here, provided reasonable assurance that LES would have funds sufficient to cover facility construction and operating costs. Hence, LES was financially qualified.

The Commission also found LES financially qualified for three other reasons which apply equally to PFS:

> [First,] the possibility that underfunding will lead to a health, safety, or a common defense or security risk is extremely unlikely in light of the extensive and detailed technical review applicants . . . must undergo to ensure safe construction and operation. [Second,] the health and safety risks associated with [the facility] are less than with operation of nuclear reactors. [Third,] NRC inspections and enforcement action go a long way toward ensuring compliance with our requirements.

Id. at 306-307 (citations omitted). As with LES, the PFS application is undergoing extensive and detailed NRC review now; the health and safety risks associated with the PFSF are far less than those associated with reactors;[26] and NRC inspections and enforcement will ensure that PFS will comply with all applicable requirements (including financial requirements).

Therefore, the Board correctly applied the Commission's LES decision to determine that PFS is financially qualified to build and operate the PFSF (subject to the litiga-

[26] See Section III.B.2 infra.

tion of facility costs). Indeed, the Commission has suggested in this case that the Board and the parties consider license conditions binding PFS to financial commitments:

> In [LES] the Commission imposed license conditions that bound the applicant to financial commitments that it had made during the licensing proceeding. Id. at 308-09. The conditions had the effect of assuring financial qualifications and obviating further litigation of these issues. The parties and the Board may wish to consider the feasibility of license conditions in this proceeding, and the possibility that appropriate conditions might avoid difficult litigation over financial issues.

CLI-98-13, 48 NRC at 36. PFS has proposed such conditions, which both the Board and the Staff have found acceptable. The State in contrast seeks to embroil the Board and the parties in difficult litigation over financial issues similar to those which the Commission found to be unnecessary in LES in view of commitments such as those made by PFS here. There is no legal basis for the State's attempt to entangle the licensing process in such unnecessary litigation, and each of its arguments should be rejected, for the reasons set forth below.

B. The Board Correctly Interpreted and Applied the Commission's Financial Qualification Regulations

The State asserts that the Board, in its reliance on the LES decision, misinterpreted and misapplied the financial qualifications requirements of Part 72 in that (1) the financial qualifications standards of Parts 70 and 72 are distinctly different, and (2) the level of risk posed by the PFSF warrants the application of Part 50 guidance in this case. State Br. at 6-15. The State's assertions are wrong on both accounts.

1. The Board Correctly Interpreted Section 72.22(e)

The State argues that the requirement to show "reasonable assurance" of obtaining necessary funds in Part 72 is virtually identical to the language of Part 50, both of which differ from the "appears to be financially qualified" standard of Part 70. Id. at 10. Fur-

ther, according to the State, Part 72 and Part 50 are the same, in that the Commission expressly stated in LES that the requirements of Part 50 and Part 70 are different and that when promulgating Part 72 in 1980 the Commission used the "reasonable assurance" language found in Part 50. Id. at 10-12. From this the State somehow concludes that the use of commitments under Part 72 is ab initio unacceptable because of the need for "showing . . . reasonable assurance" (id. at 12), which the Board correctly rejected (slip op. at 31).

First, the State's premise is misguided. The issue is not whether the standards of Parts 50, 70, and 72 are identical but whether PFS's commitment approach to demonstrating its financial qualifications satisfies Part 72. As a matter of logic, the fact that PFS's approach would also satisfy Part 70 does not disqualify it from satisfying Part 72.[27] In fact, because of the variety of activities licensed under Part 70, its financial qualifications requirements depend on the specific nature of the application and in some cases the Part 70 requirements under the "appears to be financially qualified" standard could be as stringent as Part 50 requirements (i.e., more stringent than Part 72 requirements). LES, CLI-97-15, 46 NRC at 302. In a similar vein, the State's insinuation that the "need for a more definitive regulation" than was provided under Part 70 led to more stringent requirements for ISFSIs under Part 72, State Br. at 10 n.10, is also wrong. "Definitive" is not synonymous with "stringent." Part 72 merely covers ISFSIs specifically; prior to 1980 ISFSIs were one of the wide range of facilities licensed under Part 70.[28]

[27] For example, if an applicant had cash on hand sufficient to pay the construction and operating costs of a facility for its entire lifetime, the applicant would clearly satisfy the requirements of Parts 50, 70, and 72. Compare 10 C.F.R. §§ 50.33(f)(1 and 2); LES, CLI-97-15, 46 NRC at 307 (§ 70.23(a)(5)); 10 C.F.R. § 72.22(e).

[28] Not only is the State's thesis that commitments cannot be used under Part 72 because its requirements are supposedly more stringent than those of Part 70 fatally flawed, its implicit thesis that commitments are in-

Second, as discussed in Section III.A above, the State's regulatory interpretation is meritless in that PFS's commitment approach satisfies the reasonable assurance language of Part 72. Indeed, as noted above, the Commission specifically concluded in LES that the commitments in that case "provide[d] reasonable assurance" that financial difficulties would not lead to safety problems.

Third, in promulgating Part 72, the Commission neither included nor cited the specific financial qualifications requirements of Part 50, which the State seeks to impose here. Specifically, Part 72 does not require newly formed entities to provide the information required by 10 C.F.R. § 50.33(f)(3) or Part 50 App. C. II and it does not specify the means by which applicants must estimate costs and disclose their sources of funds as Part 50 App. C. I does for construction permit applicants. Compare 10 C.F.R. §§ 72.22(e), 72.40(a)(6) with 10 C.F.R. § 50.33(f) and Part 50 App. C; LBP-00-6, slip op. at 23-26 & n.3. In LES, the Commission found the absence of these specific Part 50 requirements from Part 70 to be dispositive in holding that Part 50 did not apply to applicants for Part 70 licenses. CLI-97-15, 46 NRC at 299-300 & n.3. The absence of those same Part 50 requirements from Part 72 is equally dispositive here. Indeed, the Commission has expressly stated "financial qualifications standards established for reactor licensing do not necessarily apply outside the reactor context." CLI-98-13, 48 NRC at 36.[29]

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variably less stringent than the Part 50 requirements that it seeks to impose here is equally flawed. In fact, PFS's commitments could provide greater assurance than would be provided by Part 50 requirements in some cases. In PFS's case, the Staff will verify that PFS has committed funding sufficient to cover construction costs before construction begins and that PFS has entered into Service Agreements sufficient to cover operation and maintenance costs before operation begins. For a merchant nuclear plant under Part 50, a finding of reasonable assurance for operation can be made on the basis of cost and revenue projections; there is no requirement that the licensee prove before operating that revenue will exceed costs. See supra note 25.

[29] Thus, Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-77-67, 6 NRC 1101, 1116 (1977) (requiring demonstration of loan guarantees for reactor license applicants prior to licensing), cited in State Br. at 11, is simply inapposite here. Furthermore, on appeal the Appeal

Fourth, contrary to the State's claim, State Br. at 12, the Board's ruling did not deprive "reasonable assurance" of its meaning through the acceptance of a merely "subjective commitment." To the contrary, an applicant's licensing commitments accepted by a board are binding and enforceable.[30] Moreover, as discussed in Section III.C.2 below, it is well established under Commission practice and precedent that various licensing issues may be resolved by binding commitments.

2. The Board Was Correct Not To Apply Part 50 Requirements

The State complains that the Board erred in not applying the requirements of Part 50 to PFS as "guidance," in that the PFSF is "fundamentally more hazardous" than the uranium enrichment facility whose application was considered in LES. State Br. at 13. The State also asserts that it will be very difficult to return spent fuel to the originating reactors, that the NRC's enforcement tools will not be useful, and that the problem of storage and disposal of high level nuclear waste is intractable. State Br. at 14-15. The State's complaints are groundless.

First, ISFSIs are not "fundamentally more hazardous" than uranium enrichment facilities. This can be seen from the Commission's emergency planning regulations for uranium enrichment facilities under Part 70, which are similar to those imposed on ISFSIs under Part 72. Compare 10 C.F.R. § 70.22(i)(3) with § 72.32(a). In fact, the Commission's regulations recognize that the risk posed by an enrichment facility may be greater than that posed by an ISFSI, in that enrichment facility emergency plans may be

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Board did not hold that board review of the applicant's loan guarantee and ownership participation agreement were required but rather that such review was "within the Board's discretion." ALAB-461, 7 NRC 313, 318 (1978).

[30] Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-898, 28 NRC 36, 40 (1988).

required, under various circumstances to have an accident classification system that includes "site area emergencies,"[31] while ISFSI emergency plan accident classification systems – for away-from-reactor ISFSIs like the PFSF, that do not process or repackage spent fuel – are only required to include "alerts" and not "site area emergencies."[32] 10 C.F.R. §§ 70.22(i)(3)(iii), 72.32(a)(3).

Similarly, the State's complaints about the Board's citations in support of its finding an ISFSI's risk is substantially lower than the risk from a reactor, State Br. at 13-14 (citing LBP-00-6, slip op. at 26-28), are also unfounded. The State claims that the quoted rulemaking did not "involve the weakening of any substantive regulations, including the strenuous financial qualifications standard the Commission had adopted." State Br. at 13-14. The State misses the issue. The Board quoted the rulemaking to demonstrate that an ISFSI poses substantially less risk to the public than does a reactor, LBP-00-6, slip op. at 27-29, a point which the Commission has made on other occasions as well.[33]

Second, the State's assertion that an away-from-reactor ISFSI should be subject to stricter financial qualifications standards because it will be "very difficult to return spent fuel to its originating reactors, and impossible to return it once they have been decommissioned," State Br. at 14-15, is misplaced. As the Board noted, a need to return fuel to originating reactors will not undermine the financial qualifications of PFS. LBP-00-6,

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[31] The LES emergency plan included such an accident classification system. Safety Evaluation Report for the Claiborne Enrichment Center, Homer, Louisiana, NUREG-1492 (Jan. 1994) at 10-41.

[32] Site area emergencies pose some off-site risk to the public, while alerts do not. Curators of the University of Missouri (Trump-S Project), CLI-95-11, 42 NRC 47, 48 (1995).

[33] See e.g., Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation, Final Rule, 45 Fed. Reg. 74,693, 74,694 (1980); Rulemaking on the Storage and Disposal of Nuclear Waste (Waste Confidence Rulemaking), CLI-84-15, 20 NRC 288, 365 (1984).

slip op. at 54-57. First, the PFS License Application has express provisions for moving spent fuel off-site and returning the fuel canisters to originating reactors if necessary. PFSF SAR at 3.1-3, 5.1-8 to –9, 10.2-8, -14. Second, PFS will not have to return fuel to reactors for financial reasons. PFS will receive most of the payment for the spent fuel storage services it will provide up front, before the fuel arrives at the PFSF. PFS Utah E Mot. at 17; id. Parkyn Dec. at 9-10. Further, PFS will require financial information and may require specific financial assurance from its customers (e.g., advance payment, letter of credit, third party guarantee, or payment and a performance bond) to ensure that they make any payments owed PFS (e.g., the Annual Storage Fee). Id.; PFSF LA at 1-7 to –8. The State has provided no basis for its claim of a "large inventory of spent fuel casks" that would have to be returned by PFS for financial reasons.

Thus, PFS will be able to return fuel to the originating reactor if necessary (hypothetically due to the fuel or fuel canisters not being technically acceptable at the PFSF), but such will not be necessary for financial reasons and thus such a hypothetical event will not threaten PFS's financial well-being, and is irrelevant to the contention.

Third, the State claims that the NRC's enforcement tools will not be useful vis a vis PFS in that enforcement cannot deal with the large quantity of spent fuel that will assertedly have to remain at the PFSF if customers refuse to take it back, State Br. at 14-15, is also misplaced. As noted above, there is no reasonable basis for the State's claim that large quantities of fuel would be stranded at the PFSF. As also noted above, PFS will not have to return fuel to its customers for financial reasons. Moreover, contrary to the State's claims, the NRC's enforcement tools, in fact, will bolster PFS's financial qualifications in that PFS has been legally bound to the financial commitments it has made. See supra Section I.

Fourth, the State's argument concerning the spent fuel problem is also misplaced. The State argues that Part 50 should be applied to PFS because the Department of Energy has defaulted on its obligations to take spent fuel and that once the PFSF is built there will be "an incredible impetus" for the PFSF to operate, most likely with a facility "laden with debt." State Br. at 15-16. The State is incorrect. The NRC's waste confidence rule represents a binding determination to the contrary, that a DOE repository will be available to accept fuel from PFS before the end of the first quarter of the century. 10 C.F.R. § 51.23(a). Moreover, regardless of the State's view of an "incredible impetus" for PFS to operate, under PFS's financial commitments the PFSF will not operate until PFS has customer Service Agreements sufficient to cover its operating and maintenance expenses of the facility, which include debt servicing. See supra Section I; LBP-00-6, slip op. at 12-13; PFS Utah E Mot. at 8 (citing Parkyn Dec. at 7).

In short, the State has provided no basis for applying the requirements of Part 50 to PFS.

C. The Board's Ruling Does Not Deprive the State of Its Right to a Hearing or Inappropriately Delegate Matters to the Staff

1. The Board's Ruling Did Not Deprive the State of Its Right to a Hearing

The State argues that the Board's decision " relegat[es] financial qualification determinations to an inspection process . . . in violation of the State's right [under the Atomic Energy Act ("AEA")] to a prior hearing on all financial issues material to the licensing decision." State Br. at 16. The State's argument is erroneous in that the "material" issue under 10 C.F.R. § 72.22 – reasonable assurance of obtaining the necessary funds for construction and operation – is established by the PFS commitments made and documented as part of the licensing and hearing process in this case. The State's claim

that the Board is improperly using "post-hearing resolution" to determine PFS's financial qualifications (State Br. at 17) is also without merit.

Public participation in NRC licensing hearings under section 189(a) of the AEA is limited to "issues that the NRC considers material to licensing." Massachusetts v. NRC, 924 F.2d 311, 331 (D.C. Cir. 1991). The NRC has " 'great discretion to decide what matters are relevant to its licensing decision.' " Id. at 330. It is for the NRC, not the intervenors, to "decide what is important enough to merit examination [in the hearing process]." Bellotti v. NRC, 725 F.2d 1380, 1381 (D.C. Cir. 1983).[34]

Here, the material issues are set forth in the regulations and the Commission's decision in LES. Part 72 specifies that an ISFSI license applicant can establish financial qualifications by "show[ing] that . . . [it] has reasonable assurance of obtaining the necessary funds . . . to cover . . . [e]stimated construction [and] operating . . . costs." 10 C.F.R. § 72.22(e) (emphasis added). In LES, the Commission determined that the applicant's financial commitments (and binding license conditions) provided reasonable assurance that the applicant would obtain the necessary funds. Hence, the Commission's financial qualifications requirements were satisfied. CLI-97-15, 46 NRC at 307-09. The verification of LES's compliance with the financial license conditions was not material to the licensing. Rather, the NRC would verify compliance by inspection after licensing but before facility construction and operation. See id. at 307-09 & n.20; UCS, 735 F.2d at 1449

[34] The State misreads Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1446 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985) ["UCS"], cited in State Br. at 16-17. As the D.C. Circuit has subsequently indicated, that case "stands for the proposition that Section 189(a) [of the AEA] prohibits the NRC from preventing all parties from ever raising in a hearing on a licensing decision a specific issue it agrees is material to that decision.' " NIRS v. NRC, 969 F.2d 1169, 1174 (D.C. Cir. 1992) (en banc) (emphasis added).

& n.23 (under the Administrative Procedure Act, decisions based on inspections may be exempted from the hearing process).[35]

Thus, in accordance with the Commission's regulations and as interpreted and applied in LES, the Board's decision finding PFS financially qualified on the basis of PFS's financial commitments and binding license conditions is the material licensing issue to be decided under 10 C.F.R. § 72.22(e).[36] The Board's decision did not deny the State its right to a hearing. For the same reasons as in LES, the verification of compliance with the financial license conditions is not material to the licensing,[37] and therefore does not constitute improper use of a post-hearing determination. If an intervenor is not entitled to a hearing on an issue because it is not material to licensing, Massachusetts v. NRC, 924 F.2d at 331, then the timing of its resolution by the NRC is irrelevant.[38]

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[35] See also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 330 (1996) (assessments within the Staff's "technical expertise and its regulatory oversight role" are not material to licensing); American Cylinder Mfrs. Comm. v. DOT, 578 F.2d 24, 27 (2d Cir. 1978) (skilled evaluation by agency staff does not constitute licensing under the Administrative Procedure Act). The evaluation of PFS's compliance with the conditions would depend on what would be "technical facts," UCS, 735 F.2d at 1449 n.23, to a Staff financial analyst.

[36] While the type of financial qualification demonstration sought by the State could have alternatively been used by PFS had it not chosen the commitment approach, it is for the applicant – not the intervenor – to determine what it will use to meet regulatory requirements.

[37] Here, given PFS's commitments and the Staff's proposed license conditions, the NRC will conduct inspections to verify, after licensing but before facility construction and operation, that PFS has complied with the conditions. NRC Staff's Response to Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (Dec. 22, 1999) at 12-13.

[38] The NRC cases cited by the State, State Br. at 17, are inapposite here. First, the later Commission decision in LES is controlling. Further, Marble Hill, ALAB-461, 7 NRC at 313, is inapposite in that it was a Part 50 case rather than a Part 72 case. Further, the Appeal Board did not hold that review of the applicant's loan guarantee was required but rather that it was discretionary. Id. at 318. Consolidated Edison Company of New York (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947 (1974), is also inapposite in that it involved the reevaluation of a nuclear power plant applicant's security plan "as a whole" pursuant to new regulations and the evaluation of the design and operation of a significant plant mechanical system. Id. at 949-951. It did not involve Staff verification of applicant compliance with specific license conditions. Thus, the NRC Staff's verification of PFS's compliance to its commitments is simply not subject to the bar against post-hearing resolution, in accordance with well established Commission precedent, as discussed in subsection 2 below.

2. The Board Did Not Inappropriately Delegate Matters to the Staff

By the same token, the State's complaints that, by accepting PFS's commitment approach to demonstrating its financial qualifications, the Board inappropriately delegated material licensing issues to the NRC Staff (State Br. at 18-21) are misplaced. As discussed above, under the Commission's LES decision and Federal case law, the acceptance of commitments of an applicant is not an impermissible delegation of material licensing issues to the Staff.

Indeed, it is well established under Commission practice and precedent that various licensing issues, such as emergency planning and quality assurance, are typically resolved by binding commitments to broader programs, with the Staff verifying the applicant's compliance by the inspection of implementing procedures outside the litigation process.[39] Even contested safety issues have been resolved at NRC hearings by applicant commitments.[40] Indeed, the entire ISFSI licensing process is, in a sense, resolved by binding commitments to the facility design and operation, whose compliance subsequent to license issuance is verified by NRC Staff inspectors. Such verification of compliance is not impermissible delegation of material licensing issues. See LES, supra note 40, CLI-96-8, 44 NRC at 108-10; Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 494-95 (1986).

Further, the State's specific complaints concerning delegation are also baseless. For example, the State's claims that the Staff will have to answer "difficult questions" re-

[39] Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076; 1106-07 (1983) (emergency plan implementing procedures); Public Service Co. of New Hampshire (Seabrook Station, Unit 1 and 2), ALAB-734, 18 NRC 11, 12-14 (1984) (QA procedures).

[40] See, e.g., Louisiana Enrichment Services, L.P. (Clairborne Enrichment Center), CLI-96-8, 44 NRC 107, 110 (1996) (training and equipping of on-site fire brigade); The Curators of the University of Missouri (Trump-S Project), CLI-95-1, 41 NRC 71, 154-58 & n.139 (1995) (reactor operator staffing); Turkey Point, supra note 30, ALAB-898, 28 NRC at 38-41 (limits on enrichment of fuel stored in spent fuel pool).

garding the adequacy of PFS's allocation of liability and responsibility for spent fuel at the PFSF, State Br. at 19, neglect the fact that PFS will have the maximum commercially available off-site liability coverage and on-site liability coverage sufficient for the maximum credible accident, and that the appropriate level of property insurance will be litigated. LBP-00-6, slip op. at 64-65. The State's complaints about PFS's cost margins, debt servicing, lease payments, and cost escalation, State Br. at 20-21, are out of place, in that those issues will be litigated as part of the costs of the PFSF, which PFS will have to meet with equity and customer Service Agreements. LBP-00-6, slip op. at 25 n.3, 34, 44 & n.9, 52. PFS has adequately addressed the potential for customer default, State Br. at 20, as discussed in Sections III.B.1 and 2 supra. Thus, no improper delegation occurred.

D. The Board Did Not Overlook Genuine Issues as to Material Facts

The State's complaints about the Board overlooking material facts, State Br. at 22-25, is simply wrong, in that its alleged material facts were either not material to licensing, see supra Sections III.C.1 and 2, were rendered immaterial by PFS's financial commitments, or were so insubstantial that they never gave rise to a genuine issue, see Advanced Medical Systems, CLI-93-22, 38 NRC at 102 & n.13.

The State's list of alleged material facts and its allegation that the record is "totally inadequate," without more, State Br. at 22-23 & n.16, provide no basis for overturning the Board's decision. The State's argument about the makeup of PFS's members, id. at 23, is immaterial in that it is PFS's funding, not its members, that will govern whether the project goes forward. The State's complaint about the Board's reliance on PFS's commitments, that they are "mere promises," id. at 23, is utterly unfounded, in that

PFS has been legally bound to those commitments. LBP-00-6, slip op. at 72-73.[41] The State's complaint about the absence of draft PFS customer Service Agreements, State Br. at 23-24, is also unfounded. The Board found that reasonable assurance that PFS would obtain sufficient funds for the PFSF flowed from PFS's commitments and that PFS did not need to provide the Agreements to make the showing necessary to provide such assurance. LBP-00-6, slip op. at 40-41, 43.[42] The State's concern about the allocation of financial responsibility covering all costs, State Br. at 24, in addition to being covered by a license condition, ignores the facts that PFS's liability coverage is sufficient and the amount of on-site property coverage necessary will be litigated. LBP-00-6, slip op. at 50, 64-65, 72-73.[43] The State's allegation about spent fuel transportation between Part 72 facilities, State Br. at 24-25, is merely speculative, LBP-00-6, slip op. at 61, and does not give rise to a genuine dispute.[44] Finally, the State's complaint about "multiple financial assurance determinations," State Br. at 25, is unfounded in that the determination will be made by the Board (after the litigation of the costs of the PFSF); the only thing left for the future will be the Staff's verification of PFS's compliance with its license.

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[41] The NRC has long relied on binding commitments to satisfy licensing requirements. See, e.g., LES, CLI-97-15 46 NRC at 308; see also note 40 supra.

[42] The Board cited LES, CLI-97-15, 46 NRC at 304 (where contracts were not provided) and Waterford, ALAB-732, 17 NRC at 1106-07 for the proposition that the contracts themselves are not necessary—they are implementing details not material to licensing that the Staff can subsequently evaluate for compliance. See also Seabrook, note 39 supra, ALAB-734, 18 NRC at 12-14 (QA procedures are also evaluated after licensing).

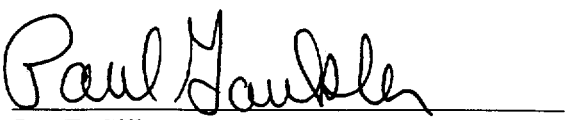
[43] Moreover, regarding the allocation of liability, were a third party to cause property damage at the PFSF, the loss would be covered by insurance and the insurer would then be able to recover against the third party, with no impact on PFS's financial health.

[44] In the event that such a shipment were to occur, the NRC could use its discretionary authority to require the shipper to obtain insurance coverage under the Price-Anderson Act. See LBP-00-6, slip op. at 61-62 (citing 42 U.S.C. § 2210(a)).

IV. CONCLUSION

For the foregoing reasons, the Applicant asks that the Commission not review the referred question, but if it does the Board's decision should be affirmed.

Respectfully submitted,



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Dated: April 17, 2000

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Commission

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 Brief on the Referral of the Grant of Partial Summary Disposition of Utah Contention E/Confederated Tribes Contention F" 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 17th day of April 2000.

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