

June 28, 1999

**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
)	
(Private Fuel Storage Facility))	

APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF UTAH G

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") files this motion for summary disposition of "Utah Contention G – Quality Assurance," ("Utah G") pursuant to 10 C.F.R. § 2.749. Summary disposition is warranted on the grounds that there exists no genuine issue as to any material fact relevant to the contention and, under the applicable Commission regulations, the Applicant is entitled to a decision as a matter of law. This motion is supported by a statement of material facts, a declaration from John Thorgersen, and the deposition of the State's designated QA witness.

I. STATEMENT OF THE ISSUES

On April 22, 1998, the Atomic Safety and Licensing Board ("Licensing Board" or "Board") admitted Utah G. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 192 (1998). Utah G, as admitted, asserts:

The Applicant's Quality Assurance ("QA") program is utterly inadequate to satisfy the requirements of 10 C.F.R. Part 72, Subpart G.

Id. at 252. In admitting the contention, the Board limited its scope to the level of detail of PFS's QA plan and the independence of its QA organization. Id. at 188.

The Applicant moves for summary disposition of Utah G on the grounds that there is no genuine dispute concerning any facts material to the adequacy of the level of detail present in the PFS QA plan and the sufficiency of the independence of the QA organization, and that PFS is entitled to judgment as a matter of law.

II. PFS IS ENTITLED TO SUMMARY DISPOSITION OF UTAH G

PFS has set forth the relevant law governing summary disposition at some length in its first motion for summary disposition, and the legal basis provided in that motion is incorporated by reference herein. See App.'s Mot. Sum. Disp. Utah C at 4-16 (April 21, 1999). PFS expects the State to file affidavits purporting to contain expert opinion in opposition to this motion and therefore the legal requirements concerning such, id. at 10-15, will be particularly relevant here. These requirements include 1) demonstration of the affiant as an expert,¹ and 2) an explanation of facts and reasons in the affidavit supporting the affiant's expert's opinion.² An affidavit made on "information and belief" is insufficient,³ as are mere unsupported conclusions.⁴ As the Supreme Court has held, reliable expert opinion must be based on "more than subjective belief or unsupported speculation." Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590 (1993).

¹ Sullivan v. Rowan Cos., 952 F.2d 141, 144 & n.6 (5th Cir. 1992). A licensing board will determine an affiant's qualifications under Rule 702 of the Federal Rules of Evidence. Florida Power & Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-950, 33 NRC 492, 501 n.5 (1991).

² See Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333, 1339 (7th Cir. 1989); Carolina Power & Light Company (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432, 447 (1984).

³ Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc., 944 F.2d 1525, 1529 (9th Cir. 1991), aff'd on other grounds, 508 U.S. 49 (1993).

⁴ Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-32A, 17 NRC 1170, 1177 (1983).

Based on deposition testimony of the State's designated witness for quality assurance, PFS does not believe that the State's witness will be able to withstand scrutiny when judged against these requirements. In particular, PFS does not believe that the State's designated witness qualifies as an expert on NRC quality assurance programs. An expert's education or experience must pertain particularly to the matter to which he or she testifies. E.g., Eagleston v. Guido, 41 F.3d 865, 874 (2d Cir. 1994), cert. denied, 516 U.S. 808 (1995) (must embrace "specific body of scientific or technical expertise pertinent" to the issue in question).⁵ Thus, for example, one could not testify to the adequacy of an NRC QA program merely by being a physicist or a nuclear engineer.

Dr. Marvin Resnikoff, the sole person whom the State has designated to testify on Utah G,⁶ lacks the experience or credentials to be considered an expert in quality assurance. His only exposure to quality assurance at NRC facilities is his review of inspection reports of the Palisades on-site ISFSI. Resnikoff Dep. at 74-75. He has no training regarding quality assurance. Id. at 75-76 ("I don't have specific training concerning quality assurance."). He has no publications regarding nuclear quality assurance. Id. at 76. He has reviewed no applications from other nuclear facilities. Id. at 79. He has no opinion regarding the level of detail required of a license application. Id. He has never reviewed the organizational structure of a nuclear facility to evaluate its independence. Id. at 83.

⁵ To be reliable, an expert opinion must have a sufficient basis in "the knowledge and experience of [the relevant] discipline." Kumho Tire Co. v. Carmichael, No. 97-1709, 119 S. Ct. 1167, 1999 U.S. LEXIS 2189, at *21 (March 23, 1999).

⁶ See State of Utah's Amended Responses to Applicant's First Set of Formal Discovery Requests, April 29, 1999, Gen. Int. No. 3 at 2-4.

With no training or experience in the preparation of QA plans and only the most limited exposure to the NRC's QA requirements, Dr. Resnikoff is not qualified as an expert in quality assurance. Because the qualifications of Dr. Resnikoff fail to satisfy the legal requirements for providing expert opinion, any opinion he may render in regards to the PFS QA Program amounts to pure speculation, which this Board should reject outright. PFS submits that this lack of QA expertise of the State's designated witness for Utah G renders the State incapable of refuting the showing of the adequacy of PFS's QA program made below and that, as a result, PFS is entitled to judgement as a matter of law.

A. PFS's QA Plan Contains Sufficient Detail To Satisfy NRC Requirements

In its bases for Utah G, the State has claimed that the PFS QA Plan lacks sufficient detail for the NRC Staff to determine the Plan's adequacy. In support, the State alleged that the QA Plan inadequately describes PFS's design control efforts, training of QA employees and minimum review intervals.⁷ The State's assertions reflect apparent confusion of the level of detail required for the QA Program in the license application compared to that required for subsequent implementation of the Program.

Under § 72.24(n) of 10 C.F.R. Part 72, which concerns the information required to be filed as part of a license application, an applicant must include a "description of the quality assurance program that satisfies the requirements of Subpart G." Subpart G of Part 72, specifically 10 C.F.R. § 72.140(c), requires an applicant to "file a description of

⁷ "State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, L.L.C. for an Independent Spent Fuel Storage Facility," dated November 23, 1997 [hereinafter "Utah Cont."] at 43-45.

its quality assurance program, including a discussion of which requirements of [Subpart G] are applicable and how they will be satisfied” This level of detail described for a Part 72 ISFSI license application is consistent with the level of detail required of other NRC license applications, including reactor construction permit applications (10 C.F.R. § 50.34(a)(7)) and operating license applications (10 C.F.R. § 50.34(b)(6)(ii)). Thorgersen Dec. at ¶ 7. The purpose of this material is to provide the Staff with enough information to determine whether an applicant’s QA program, when implemented through procedures to be subsequently developed, will comply with the requirements of Subpart G.

This level of detail is appropriate because the focus of the review process is on the commitments contained in the QA Plan and not on the detailed implementing methodologies or procedures. Thus, procedures containing the specific details of implementation are not required.⁸ Thorgersen Dec. at ¶¶ 5-8. That the focus is on commitments is apparent from NRC regulations governing the ability of reactor licensees to make changes to their QA program descriptions. Under 10 C.F.R. § 50.54(a)(3), as amended on February 23, 1999, reactor licensees “may make a change to a previously accepted quality assurance description included or referenced in the Safety Analysis Report without prior NRC approval, provided the change does not reduce the commitments in the program description previously accepted by the NRC.” 64 Fed. Reg. 9030, (emphasis added.) Because the regulatory requirements for reactor and ISFSI requirements QA program descriptions

⁸ In Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 12-14 (1984), the Appeal Board affirmed that QA procedures do not need to be submitted as part of a license application under 10 C.F.R. 50.34(b)(6)(ii).

are very similar, the level of detail required for an ISFSI QA program description likewise would be focused on the adequacy of commitments made in the program description, not on the detailed procedures for implementing the program.

The PFS QA Program, as described in the Quality Assurance Program Description (“QAPD”) and the SAR, satisfies the NRC regulatory requirements and contains sufficient detail to allow the Staff to conduct an effective evaluation of its adequacy.

Thorgersen Dec. at ¶¶ 9-11. Specifically, SAR Sections 11.1.1 through 11.1.18 and QAPD Sections 1 through 18 adequately describe the 18 sections of the PFS QA Program and PFS’s commitments for satisfying the individual requirements of 10 C.F.R. Part 72, Subpart G. Id. at ¶ 9. The commitments contained within these sections are sufficient to satisfy 10 C.F.R. § 72.24(n).

The specific shortcomings alleged by the State are either immaterial, because the information is not required, or factually erroneous, because the material is actually present. For example, the State incorrectly asserts that design control is inadequately described. Section 11.1.3 of the SAR and Section 3.0 of the QAPD adequately describe how the QA Program will satisfy the requirements of 10 C.F.R. § 72.146. See Thorgersen Dec. at ¶ 12. Similarly, the rest of the State’s allegations of lack of detail are without merit. Id. at ¶¶ 10-15. None of the State’s assertions show or suggest in any respect that PFS’s commitments fail to satisfy the requirements of 10.C.F.R. Part 72, Subpart G. Id. Thus, the State’s claims must be rejected.

B. PFS's Quality Assurance Organization is Sufficiently Independent

In basis 4 of Utah G, the State claims that PFS's QA organization lacks sufficient independence to effectively implement the QA Program. The State supports its allegation by stating the SAR fails to describe the interrelationships between the QA Committee and the Architect/Engineer ("A/E") group, fails to identify who is responsible for the day-to-day pre-licensing activities, fails to meaningfully describe the organizational structure and responsibilities, and fails to provide independent oversight of the program. Utah Cont. at 50-51. These claims lack merit.

Under 10 C.F.R. § 72.142(b), the QA organization must have sufficient authority and independence to identify and rectify quality problems. To ensure this independence, the QA organization must have access to a level of management that can ensure that quality issues are considered independently of cost and schedule concerns. The PFS QA Program, as described in the SAR and the QAPD, ensures that the QA organization has sufficient independence to effectively perform its QA functions during the licensing, construction, and operation of the facility. Thorgeresen Dec. at ¶¶ 18-19.

The State's allegation that PFS "fails to describe the interrelationship between the [A/E] and the QA Committee and how the relationship enhances QA" (Utah Cont. at 50) is incorrect. Sections 11.1.1 and 11.1.7 of the SAR and QAPD Sections 0.0, 1.0 and 7.0 discuss how the QA Committee must approve, review and audit the A/E, and has the authority to stop work when the project is not in compliance. Thorgeresen Dec. at ¶ 20. Further, the described relationship between the two entities and the described responsi-

bilities of each set forth how QA will be maintained, and no more is required at this stage. Id. at ¶ 21.

The State also erroneously asserts that “the SAR fails to identify who is responsible for pre-licensing ‘day to day activities, costs, or schedules.’” Utah Contention at 50. This claim has no foundation. The SAR shows that the QA Committee, the responsible QA entity during the pre-licensing phase, “is an independent organization” reporting to the Board of Managers that “shall not be responsible for day to day activities, costs, or schedules.” Thorgeresen Dec. at ¶22. Thus, the PFS QA Committee has no direct responsibilities in those areas which it audits (as required by 10 C.F.R. § 72.176). Moreover, Section 1.0 of the QAPD indicates that the Project Director is responsible for “the day-to-day direction of all aspects associated [with PFS], including licensing activities and enforcement actions,” and that the Architect/Engineer is responsible for “project design, preparation of license applications and any other activities as directed by the Project Director.” Thorgeresen Dec. at ¶ 22.

Without providing a single example, the State makes the broad claim that the SAR fails to describe the functional responsibilities, interrelationships and authorities. Utah Cont. at 50. This is totally without merit. SAR Chapter 11, read in conjunction with SAR Chapter 9 and the QAPD, provides a clear and full description of how the QA organization interacts with the other units of the PFS. Thorgeresen Dec. at ¶¶ 22-25.⁹ In

⁹ The QA organization’s responsibilities and interrelationships during pre-licensing activities are described in SAR Sections 9.1.1.1 and 11.1.1., 9.1.1.2.1, and QAPD Sections 0.0, 1.0 and 7.0. Thorgeresen Dec. at ¶¶ 22-24. Similarly, the organization’s activities during the construction phase are described in SAR Sections 9.1.1.1, 9.1.1.2,2 and Figure 9.1-2; the operational phase is described in SAR sections 9.1.1.1, 9.1.1.2.3 and

all three phases, the QA organization is responsible for establishing and verifying the effective implementation of the QA Program, as reflected in the cited SAR sections as well as in SAR Section 11.1.1 and the QAPD. Id. Other PFSF functions are performed by other PFS organizations as described in the cited SAR provisions. Further, the QAPD and SAR expressly provide that the PFS QA organization shall be an “independent organization” that “shall have direct access to the Board of Managers” and “shall not be responsible for day to day activities, costs, or schedules.” Id. at ¶ 25; QAPD at 3; SAR at 11.1-2. These descriptions of QA’s responsibilities and interrelationships with other organizations are adequate to satisfy the NRC regulatory requirements. Id. at ¶¶ 20-25.

Finally, the State claims that the QA organization’s objectivity is compromised by allowing “responsible individual organization management to determine the adequacy of the QA over their own programs.” Utah Cont. at 51. To support this claim, the State quotes QAPD § 2. Since this language is almost a verbatim recitation of the regulatory language of 10 C.F.R.72.144(d), the State’s concern is misplaced. The QAPD does not allow unit managers to determine the adequacy of their programs but simply requires them to review their unit’s performance. Thorgersen Dec. at ¶ 26. This reflects the common sense notion that each organization within PFS must work to ensure the quality and safety of the project’s design, construction and operation. The PFS QA organization will independently audit the implementation of the QA Program by other PFS organiza-

Figure 9.1-3. SAR sections 9.1.1.3 and 9.1.4 describe QA’s functional responsibilities and relationships with outside contractors, suppliers and vendors. Id. at ¶ 25.

tions to determine the adequacy of the implementation of the QA Program. But, as reflected in 10 C.F.R. 72.144(d) and QAPD 2.0, other organizations are to review the status and adequacy of that part of the program they are executing in light of the QA audit results, and take appropriate action as may be necessary. Thus, the section of the QAPD quoted by the State does not reflect a lack of independence of the PFS QA organization, but the proper manner in which other organizations are to ensure the proper implementation of QA requirements.¹⁰

III. CONCLUSION

For the above reasons, the Board should grant PFS summary disposition for Utah Contention G.

Respectfully submitted,



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Dated: June 28, 1999

¹⁰ The State in its response to PFS discovery has raised additional assertions of QA deficiencies all beyond the scope of Utah G. See State of Utah's Responses and Objections to Applicant's First Set of Formal Discovery Requests, April 14, 1999, Utah G Int. Nos. 1 and 2 at 13-17. First, the State claims that PFS has not provided "detailed design information" in Chapter 4 as SAR (Facility Design). *Id.* at 14. But nowhere does Subpart G of Part 72 require such detailed design information, and it is totally unrelated to the State's QA claims in Utah G. Thorghersen Dec. at ¶ 27. Further, the State also asserts that QA problems with a storage cask vendor and its subcontractors "indicate the clear need for a comprehensive and detailed quality assurance program for PFS" and that because the PFS project consists of a large number of independent utilities handling half the nation's spent fuel, "PFS must verify the integrity of the irradiated fuel that is put inside the cask, the loading of the fuel, and the welding of the canister." State Resp. at 17, 18. Both these assertions relate to the Basis 2 of Utah G (Utah Cont. at 45) which was rejected by the Board. LBP-98-7, 47 NRC at 188. Thus they are beyond the scope of the contention and must be dismissed. Moreover, both lack any merit related to the claims admitted in Utah G. Thorghersen Dec. at ¶¶ 28-29.

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STATEMENT OF MATERIAL FACTS
ON WHICH NO GENUINE DISPUTE EXISTS

The Applicant submits, in support of its motion for summary disposition of Utah G, this statement of material facts as to which the Applicant contends that there is no genuine issue to be heard.

1. By letter dated November 3, 1995, the NRC approved a Quality Assurance Program Description (QAPD), under 10 C.F.R. Part 71, Subpart H, that had been submitted by PFS's predecessor, the Mescalero Fuel Storage, L.L.C. Thorgersen Dec. at ¶ 3.
2. In August 1996, PFS submitted to the NRC a revised version of the Mescalero QAPD which the NRC also approved as meeting the requirements of 10 C.F.R. Part 71, Subpart H. Thorgersen Dec. at ¶ 3.
3. The current version of the PFS QAPD contains only minor revisions from the former version, none of which reduce any commitments made in the former version of the QAPD. Thorgersen Dec. at ¶ 3.
4. In the basis for Contention G, as admitted by the Board, the State alleges that the PFS QA Program is inadequate to satisfy the requirements of 10 C.F.R. Part 72, Subpart G, in that the PFS QAPD lacks sufficient detail (basis 1).
5. 10 C.F.R. § 72.140(c), requires "[e]ach [applicant to] file a description of its quality assurance program, including a discussion of which requirements of [Subpart G] are applicable and how they will be satisfied" NRC regulations do not require an applicant to provide as part of a license application the detailed

means or procedures by which a QA program is to be implemented. Thorgersen Dec. at ¶¶ 5-6.

6. The SAR and the QAPD contain the commitments that form the basis of the PFS QA program. They describe the 18 sections of the PFS QA Program and how PFS will meet the individual requirements of 10 C.F.R. §§ 72.142-72.176. In the QAPD PFS commits further that “the QA [Program] and implementing procedures shall be designed and administered to meet the 18 criteria of 10 C.F.R. 71, Subpart H and 10 C.F.R. 72, Subpart G.” Thorgersen Dec. at ¶ 9.
7. The SAR and the QAPD describe the PFS QA Program to a level of detail sufficient to satisfy the Commission’s requirements under 10 C.F.R. §§ 72.24(n) and 72.140(c). Thorgersen Dec. at ¶ 9.
8. The various claims raised by the State in basis 1 to Utah Contention G are without merit. Throughout this basis, the State is seeking more detail than that required by the NRC regulations at the license application stage. Thorgersen Dec. at ¶¶ 10-15.
9. In the bases for Contention G, the State also alleges that PFS’s QA Program is inadequate in that the QA organization lacks adequate independence (basis 4). Thorgersen Dec. at ¶ 4.
10. NRC regulations require that the QA organization “must have sufficient authority and organizational freedom to identify quality problems; to initiate, recommend, or provide solutions; and to verify implementation of solutions.” 10 C.F.R. § 72.142(b). The QA organization must also “report to a management level that ensures that the required authority and organizational freedom, including sufficient independence from cost and schedule considerations when these considerations are opposed to safety considerations, are provided.” *Id.*; Thorgersen Dec. at ¶ 16.
11. The PFS QAPD and SAR show, as required by 10 C.F.R. § 72.142(b), that the QA organization will have sufficient independence to ensure that the QA program has been effectively implemented. Thorgersen Dec. at ¶¶ 18-19.
12. In the pre-licensing organization of PFS, the PFS QA Committee reports directly to the Board of Managers, which is the highest level in the organization. Thorgersen Dec. at ¶ 18.
13. In the licensing and construction organization of PFS, for the construction of the PFSF, the QA organization reports to the Project Director with an interface to the Board of Managers. Thorgersen Dec. at ¶ 18.
14. In the operational organization of PFS, for the operation of the PFSF, the QA organization reports to the General Manager/Chief Operating Officer with an inter-

face to the Board of Managers and the Safety Review Committee. Thorgeresen Dec. at ¶ 19.

15. Both the SAR and the PFS QAPD expressly provide the QA organization with the necessary independence and authority to act to ensure that the PFS QA program is being effectively implemented. Thorgeresen Dec. at ¶¶ 18-19.
16. The description of the PFS QA organization provided in Section 11.1.1 of the SAR and the QAPD satisfies the requirements for 10 C.F.R. § 72.142 for independence of the organization. Thorgeresen Dec. at ¶¶ 18-19.
17. The various claims raised by the State in the remainder of basis 4 to Utah G concern points that PFS has expressly addressed or request more than what is required by NRC regulations. Thorgeresen Dec. at ¶¶ 20-26.
18. The PFS QA program adequately describes the interrelationship between the Architect Engineer and the QA organization and how the interrelationship will function to maintain QA. Thorgeresen Dec. ¶¶ 20-21.
19. The PFS QAPD and SAR description of the general functional responsibilities of the various organizations for the pre-licensing phase show that QA does not have responsibility for day-to-day activities, cost, or schedule and adequately describe how the quality assurance of quality- and safety-related activities is to be maintained. Thorgeresen Dec. at ¶¶ 22-24.
20. The QAPD and SAR adequately describe the licensing, construction and operations, functional responsibilities, interrelationships and authority for performing quality and safety related activities. Thorgeresen Dec. at ¶¶ 20-25.
21. Providing that the management of organizations participating in the QA program shall regularly review the status and adequacy of that part of the program which they are executing does not violate the NRC's requirement for independence of the QA organization. Thorgeresen Dec. ¶ 26.
22. The various claims alluded to by the State in its responses to PFS discovery do not concern or indicate the inadequacy of the PFS QA program description in the license application. Thorgeresen Dec. at ¶¶ 27-29.
23. The QA Program contains an adequate level of detail to satisfy 10 C.F.R. § 72.24(n) requirements for a "description" of the QA program. Thorgeresen Dec.
24. The QA Program also ensures the independence of the QA organization through all phases of the design, construction and operation of the PFS facility to satisfy 10 C.F.R. § 72.142. Thorgeresen Dec.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Motion for Summary Disposition of Utah Contention G – Quality" and "Statement of Material Facts," dated June 28, 1999, and supporting Declaration from John Thorgersen were served on the persons listed below (unless otherwise noted) by e-mail, with exhibits thereto by facsimile, with conforming copies by U.S. Mail, first class, postage prepaid, this 28th day of June, 1999.

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Paul A. Gaukler

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ATTACHMENTS FOR

**APPLICANT'S MOTION FOR SUMMARY
DISPOSITION OF UTAH G - QUALITY ASSURANCE**

<u>Tab No.</u>	<u>Subject</u>
1.	Declaration of John Thorgersen
2.	Excerpts from Deposition of Marvin Resnikoff