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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation)	)	ASLBP No. 97-732-02-ISFSI
	)	December 27, 1999

STATE OF UTAH'S RESPONSE TO THE APPLICANT'S MOTION FOR PARTIAL SUMMARY DISPOSITION OF UTAH CONTENTION E/CONFEDERATED TRIBES CONTENTION F
[Redacted Version]

Pursuant to the Board's Order of December 6, 1999, the State responds to the Applicant's December 3, 1999 Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F ("PFS Motion"). This response also includes the State of Utah's Statement of Disputed and Relevant Material Facts ("Material Facts").

The Applicant's Motion purports to address all the bases of Utah Contention E, except basis 6. Motion at 10-20. Most of the Applicant's showing that it rendered the State's bases moot or irrelevant are based, primarily, on the vague and unsupported commitments put forward by PFS not to commence construction until it has sufficient funds to construct a [**REDACTED**] facility and not to operate until it has long term customer agreements in place. Furthermore, documentation to support the Applicant's motion is either absent or incomplete.[1]

[1] *E.g.*, the substance of storage agreements with customers is absent and the PFS Limited Liability Agreement ("LLC Agreement"), Parkyn Dec Exh 2, is incomplete.

The Applicant's ill-placed reliance on its unsupported commitments does not show that any of the bases of Contention E are now moot or irrelevant. As discussed below, PFS's commitments do not have a level of specificity to allow a future demonstration of financial assurance nor do they present a mechanism whereby the Intervenor (or the Board) may review or challenge such a demonstration.

The State endeavored to uncover relevant facts from the Applicant through discovery but the Applicant has refused to respond. The State propounded two sets of discover upon the Applicant during the formal discovery period and another set during the current discovery window. The discovery that PFS refused to answer during formal discovery and again during the discovery window relates to PFS's efforts to obtain customer service agreements, the scope and substance of those agreements, and in general, the potential customer and PFS member base that may support the PFS facility. The State agreed to PFS's request to file its latest response to discovery late, only to be served on the same day with a non-responsive discovery pleading and a motion for summary disposition on Contention E.[2] Thus, the record before the Board as to the Applicant's financial plan and financial qualifications is woefully deficient.

STANDARD OF REVIEW

Pursuant to 10 CFR § 2.740, 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

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[2] *See* Factual Background in State of Utah's Motion to Compel Applicant to Respond to State's Fourth Set of Discovery Requests, at 1-3, dated December 14, 1999.

matter of law." The burden of proving entitlement to summary disposition is on the movant.[3] Because the burden of proof is on the proponent, "the evidence submitted must be construed in favor of the party in opposition thereto, who receives the benefit of any favorable inferences that can be drawn."[4] Furthermore, if there is any possibility that a litigable issue of fact exists or any doubt as to whether the parties should be permitted or required to proceed further, the motion must be denied.[5] Summary judgment may also be denied or continued if the opposing party demonstrates in its affidavits that it cannot present facts essential to justify its opposition.[6]

ARGUMENT

The Applicant's legal arguments that it need provide nothing more than baseless commitments are premised on Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997) (hereafter "LES") and the Commission's off-hand comment in this proceeding when it issued an order addressing standing appeals.[7]

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[3] Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).

[4] Sequoyah Fuels Corp. and General Atomics Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361, *aff'd* 40 NRC 55, CLI-94-11 (1994).

[5] General Electric Co. (GE Morris Operation Spent Fuel Storage Facility), LBP-82-14, 15 NRC 530, 532 (1982).

[6] 10 C.F.R. § 27.49(c); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577 (1986).

[7] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36-37 (1998) (hereafter "CLI-98-13").

Applicant's Motion at 3-4. LES was decided under a different regulatory scheme--Part 70, not Part 72. In addition, the potential movement of 4,000 casks containing high level nuclear waste for storage in Utah is significantly different than the uranium enrichment process proposed at the Claiborne Enrichment Plant. Thus, a mere paper commitment, without more, does not suffice to show that the Applicant is financially qualified under Part 72. Furthermore, a Part 72 licensee cannot meet the requirements of a specific regulation through vague license conditions. Moreover, post-license review of PFS's demonstration of financial assurance violates Intervenors' right to a hearing. Finally, any directive from the Commission in CLI-98-13 was merely suggestive and not determinative that the type of license conditions proposed by PFS would satisfy Part 72.

A. LES is Not Controlling Because the Same Factors Are Not Present and the Use of Part 50 As Guidance is Appropriate in This Case.

In evaluating financial assurance in LES, the Commission looked at the nature of the facility, whether enforcement action would be effective, and the specifics of LES's financial plan. Also, LES did not preclude reference to Part 50 in certain circumstances.

1. Part 70 and Part 72 Financial Assurance Regulations Are Not Equivalent.

The Applicant argues that its "commitments" are analogous to those approved by the Commission in the LES case. The financial qualifications in LES, however, were analyzed under Part 70, not Part 72. ISFSI regulation was originally governed by Part 70

until the first issuance of Part 72 in 1980.[8] The financial assurance language in Part 70 is completely different from that in Part 72. Part 70 merely requires that the applicant "appears to be financially qualified," in order to be granted a materials license. 10 CFR § 70.23(a)(5). *See also* LES.[9] In contrast, an applicant for a Part 72 ISFSI license must show that the applicant "is financially qualified," or has "reasonable assurance of obtaining the funds" in order to be granted a license to construct and operate an ISFSI. 10 CFR § 72.22(e). In fact, the language of Part 72 is almost identical to the language in Part 50. *Cf* 10 CFR. § 72.22(e) with 10 CFR § 50.33(f)[10].

There is every reason to turn to Part 50 for guidance in determining financial qualifications under Part 72. The language in Part 72 and Part 50 is essentially the same.

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[8] *See* State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility, at 29, dated November 23, 1997.

[9] The Commission in LES makes several references to whether the Applicant "appears to be financially qualified." *See* LES, 46 NRC at 298 ("Part 70 financial qualification regulations contemplate a case-by-case inquiry to determine whether an applicant 'appears to be financially qualified.'"); Id. at 299 (comparison between the part 70 phrase "appears to be financially qualified" and the 10 CFR § 50.33(f)(1) language that the applicant submit financial information demonstrating "that it actually 'possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs.'"); and Id. at 306 (the Commission determined that LES "'appears to be financially qualified' to construct and operate the CEC...").

[10] Section 50.33(f)(1) and (2) require "the applicant shall submit information that demonstrates that the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction ... and operation costs for the period of the license."

Moreover, the Commission in LES said that in some cases the Commission may "apply any or all of the criteria imposed by Part 50." LES, 46 NRC at 302. Furthermore, the Board agreed, in admitting Contention E, that "Part 50 should be used as guidance in reviewing PFS's financial qualifications." LBP 98-7, 47 NRC 142, 187. Section 50.33(f) and Part 50, Appendix C provide guidance, especially for non-utilities and newly-formed entities. The relevant circumstances here warrant guidance from Part 50. The Applicant is a newly-formed special purpose entity without any operating record or independent asets. The IFSIS will be a one-of-a-kind centralized facility and if licensed would be authorized to store a significant portion of spent nuclear fuel from the nation's commercial nuclear reactors. The lack of revenue to safety operate or the abandonment of casks if PFS, without any deep pocket standing behind it, gets into financial straights, raises significant health, safety and national defense problems. *See* Sheehan Dec. at ¶¶13, 20, attached as Exh. A. Thus, guidance from Part 50 to evaluate PFS's financial qualifications, such as the relationship among the PFS members, its capital structure, and documentation of its funding sources is warranted, in this case.

Finally, under Part 72 the Commission may only issue an ISFSI license upon a finding that the applicant "is financially qualified to engage in the proposed activities...." 10 CFR § 72.40(a)(6). No such language appears in Part 70. Thus, the Commission would be violating its own rule if it issued a license with the proposed PFS commitments.

2. The Nature of the Facility in the LES Case Differs Significantly from the Facility in the PFS Case.

The Applicant in LES applied for a Part 70 license to construct and operate a uranium enrichment facility where it intended to process UF_6 into enriched uranium. *See* LES, LBP-96-26, 44 NRC 331, 335 (1996). Such a manufacturing process is totally different from the construction and operating license PFS is seeking for the centralized storage of up to 4,000 casks of spent nuclear fuel. Granting PFS a license would precipitate the unprecedented movement of spent nuclear fuel across the United States for storage at one site in Utah.

Any comparison to the Commission's rationale in LES that if the applicant could not sufficiently fund the construction and operation of the processing facility, health and safety should not be compromised, is misplaced in the case of PFS. PFS Motion at 9-10. In LES, the facility would not begin processing until it had supply contracts in hand for the end product, enriched uranium. LES, 44 NRC at 307. Moreover, while depleted uranium tailings from processing UF_6 is a low level radioactive waste (primarily U_{238}), the level of toxicity of high level nuclear waste is orders of magnitude greater than depleted uranium.[11] In fact, the Commission noted the difference in LES thus: "nuclear reactors are entirely different from uranium enrichment facilities in concept, complexity, and degree of risk.... [H]azards posed by this process (uranium enrichment) are much less

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[11] For example, there are 3.4×10^{-7} curies/gram specific activity of U_{233}. 10 CFR Part 71, App. A. Based on the following, a spent fuel cask at PFS would typically contain 3.25 million curries of gamma radiation: (68 fuel assemblies) x (1.77×10^{15} photons/sec.) divided by (3.7×10^{10} photon/sec/curie) = 3.25×10^{6} curies. *See* HI-STORM TSAR, Table 5.2.6.

than those potentially represented by nuclear power plants which have large inventories of radionuclides and the stored energy for dispersing them." LES, 44 NRC at 306 n.18

3. NRC Enforcement Action is No Substitute for an Up-Front Financial Determination.

PFS's reliance on LES for the proposition that "NRC inspections and enforcement action go a long way toward ensuring compliance with our requirements" does not apply to the unique circumstances at PFS. PFS Motion at 9; LES, 46 NRC at 306-07. PFS is more on a par with a nuclear power plant than the manufacturing facility in LES. The large inventory of radionuclides at PFS from the potential storage of up to 40,000 MTU far exceeds the inventory of radionuclides at any one commercial nuclear power plant. Moreover, nuclear plants throughout the United States will be concentrating their spent nuclear fuel at one location. Once the fuel is on-site at PFS, the casks cannot easily be returned to the reactor site. Furthermore, many of the reactors storing fuel at PFS will be decommissioned either prior to sending fuel to PFS or during the PFS license term. Therefore, the fuel will remain on site at PFS regardless of whether the customer continues to make annual operating payments or whether PFS has sufficient funds to safely operate the facility. State Material Facts ¶¶ 31, 77, 78.

No amount of inspection or enforcement will be able to deal with spent nuclear fuel casks that will be stuck at PFS. If a defaulting customer has fuel stored at PFS from a decommissioned reactor, the fuel must remain at PFS. Moreover, under the PFS LLC Agreement, there are various ways in which the licensee (*i.e.* the limited liability

company, hereafter "LLC"), may terminate or members withdraw from the consortium. *See* Material Facts at ¶¶ 47-49, 51-53. Without any deep pocket backing this venture, the LLC may fold, abandoning the casks at the Skull Valley site. Accordingly, financial assurance must be shown up-front before license issuance.

There are good reasons why Part 72 requires an up-front determination of financial assurance. For decades, the United States has struggled with the intractable problem of storage and disposal of high level nuclear waste. The U.S. Department of Energy has defaulted on its statutory obligations to pick up spent fuel by January 31, 1998. 42 USC § 10222(a)(5). To allow PFS to proceed without anything more than the vague commitments it has proposed is not only foolhardy but it also ignores the turbulent history of the management and disposal of spent fuel. Once constructed, there will be an incredible impetus for PFS to go forward with operations to generate some revenue. Unlike the separate construction and operating license for a nuclear power plant, PFS will be issued a combined construction and operating license. In its material facts, the State has pointed out that PFS most likely will only be able to proceed with operations if the facility is laden with debt and such a revenue stream will be insufficient to safely operate the facility. State Material Fact at ¶ 32 . As stated in Gulf States Utilities Co. (River Bend Station, Unit 1), LBP-95-10: "a licensee in financially straitened circumstance would be under more pressure to commit safety violations or take safety 'shortcuts' than one in good financial shape." 41 NRC 460, 473 (1995).

Safety is at the heart of NRC's financial qualification rule. Allowing a financially

unqualified entity the privilege of engaging in a highly dangerous activity without an up-front demonstration that the licensee will be financially sound directly affects health and safety. Moreover, reliance on Staff inspections and enforcement is not sufficient to ensure safety. As noted in River Bend, "responsibility for safe facility operation rests primarily in the licensee and not the Staff." Id. at 470. One look at NRC's Site Decommissioning Management Plan list of contaminated sites is indicative of NRC licensees who, through financial difficulties, and have created health and safety problems.[12] Other examples of financially strapped nuclear licensees that have encountered health and safety concerns include Gulf States River Bend Station, and Sequoyah Fuels. *See e.g.,* River Bend, 41 NRC 460 (1995); and Sequoyah Fuels Corporation and General Atomic (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-96-24, 44 NRC 249 (1996). In addition, the State has first hand experience with the Atlas mill and tailings pile in dealing with the NRC's deferral in making financial assurance decisions. NRC would not increase Atlas' bond until NRC approved an amended reclamation plan. NRC took more than five year to approve a reclamation plan for Atlas. In the meantime, Atlas filed for Chapter 11 bankruptcy, leaving no funds to take any action to ameliorate ground water contamination. *See* Sinclair Dec., attached as Exh. B. NRC's inspection and enforcement action falls short of protecting public health and safety if the NRC licensee

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[12]*See* Decommissioning Management Plan, NUREG-1444, Suppl. 1, November 1995; *see also*, Final Rule, Timeliness in Decommissioning of Materials Facilities, 50 Fed Reg. 36026, 36027 (1994).

has no finances to undertake necessary measures to protect public health and safety.

Of particular importance in the PFS case, is that the facility cannot be safely "shut down." In order to shut down the centralized storage of up to 4,000 casks, there must be some place to send the casks. PFS's argument that its lack of economic success will have no adverse effect on public health and safety or the common defense and security, completely glosses over the disposition of 4,000 casks should PFS go belly-up.

4. **Part of the Commission's Application of a Legal Standard in LES Involved the Evaluation of a Sophisticated Financial Plan.**

In LES, the Commission relied, in part, on the fact that "LES has developed a reasonably sophisticated financial plan" LES, 46 NRC at 307. The Commission, in LES, 46 NRC at 306, found:

> Prior to full production, contingencies will be covered by insurance, indemnification agreements, reserves, or additional capital draws on the equity investors. The permanent debt estimate to complete the plant includes coverage for a debt service reserve fund and working capital from lenders.

In the PFS case, the State has raised legitimate concerns about the scope of PFS's contingencies and liability and whether they will be covered by insurance. The PFS commitments do not address contingent liabilities from losses and damages from on-site accidents or natural events. Sheehan Dec. at ¶ 9.c-d, n. Furthermore, PFS insurance coverage statements are contradictory. On the one hand, PFS says that NRC does not require ISFSI licensees to maintain on-site property or off-site liability insurance. Parkyn Dec. at ¶ 20. On the other hand, PFS "currently contemplates" it will maintain insurance that will meet any insurance coverage required by NRC, citing to NRC proposed rule on

insurance for shut down reactors. Parkyn Dec. at ¶ 21. The proposed NRC rule offers no support for the Parkyn declaration because NRC specifically states that the rule does not address financial protection requirements for ISFSIs. 62 Fed. Reg. 58,690-91.

Another significant fact is that PFS is located next door to a military bombing range, and the airspace above the PFS facility is used for ingress and egress by military aircraft to the range. The potential for military aircraft or cruise missiles to crash into spent fuel casks requires a level of insurance that may not otherwise be required of facilities located in a less dangerous area. Furthermore, the Staff has not taken a position on the issue of military aircraft hazards (Utah Contention K). *See* NRC Staff's Statement of its Position Concerning Group I-II Contentions dated December 15, 1999 at 2.

PFS has not proposed any specific financial plan, merely that it will raise funds through equity contributions, service agreements with customers, or debt. Parkyn Dec. at ¶¶ 5, 7. Of note, all of PFS's expenses, whether the costs relate to construction and operation of the ISFSI or some other pre-existing liability, such as legal obligations to the Skull Valley Band of Goshutes or BLM, cask manufacturing costs, transportation-related costs, legal fees, etc. must be funded from the same source. To the extent that PFS may finance most of the construction of the facility with loans or bonds, there would be an insufficient income stream to cover both the construction debt service, other fixed obligations, and ISFSI operation and maintenance costs. *See* Sheehan Dec. at ¶ ¶ 9.b., 12. Therefore, it is critical that PFS demonstrate how it will obtain working capital and how it will achieve coverage of debt service prior to license issuance because a facility laden

with debt may have a tendency to cut corners and compromise safety.

PFS's efforts to interest any customers to date in storing fuel at PFS, whether members or non-members of PFS, are cloaked in secrecy.[13] Moreover, PFS will not subject its financial plan to scrutiny in order to obtain a Part 72 license. Significantly, the Applicant claims that its entire Motion and supporting documentation should be considered proprietary. Not only does the Applicant intend to rely on some indeterminate commitments not to build or operate the ISFSI until it considers it has sufficient funds in hand, but it also wants to hide behind a veil of secrecy in having the Board and Staff endorse this concept. The State requests that the Applicant's Motion in its entirety, with the possible exception the Limited Liability Agreement, Exhibit 2 to the Parkyn Declaration, be declared an open public record. The Applicant's Motion consists of legal argument, which obviously is not proprietary, and information that is already in the public domain. Much of the factual information is in the license application and some of the general financial funding is contained in RAI responses.[14] The State submits part of its Response as an open public document; the portion of this response that may disclose information from PFS confidential sources is submitted as a proprietary pleading.

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[13]As already noted, PFS has refused to answer any marketing-related discovery timely submitted to it by the State. If PFS has no substantial asset base and no substantial revenue stream from customers, either actual or committed, or even forecast by means of a valid market study, the requirements of 10 C.F.R. 72.22(e) cannot be met.

[14]*See e.g.*, Applicant's September 15, 1998 Response to LA RAI Ch. 1 (Redacted Version) wherein the PFS states the its current financial plan calls for PFS members to make an aggregate equity construction of $6 million for Step V of the project.

However, the State makes no representation as to the proprietary nature of any part of this pleading.

B. PFS's Commitments are so Vague and Ambiguous, They Completely Undermine Any Reasonable Assurance Determination and Violate Intervenor's Right to a Hearing.

The commitments PFS has proposed--not to construct or operate the ISFSI until it has sufficient funds--are vague, ambiguous and contradict PFS's license application. As to the construction commitment, it is unclear what the term "construction of the ISFSI" means. An essential component of PFS's operation is its ability to transport casks to the Skull Valley site. To do this PFS must construct a rail line from Low, Utah, or construct an intermodal facility ("ITF") at Rowley Junction. Under the license application, PFS proposed to do both. SAR, rev. 3 at 1.1-2. Without any independent assets, the financing of all construction, including the rail spur and ITF will come from the same source. As to the operational commitment, PFS has not obligated itself to recover all operational, maintenance and fixed costs. *See* Material Facts at ¶ 12, 27.

Perhaps the greatest concern to the State is whether PFS will be the sole arbiter of whether it has met the requirements of § 72.22(e). It is unclear whether the commitments proposed as license conditions would (a) delay until later the finding by the Board or the Staff that the criteria in § 72.22(e) are met, or (b) allow PFS to make its own assessment that it has sufficient finances to construct and operate the facility. In the later case, PFS is essentially requesting a waiver of a financial assurance determination under Part 72. Such substantive regulatory determinations cannot be met by the vague license conditions

proposed by PFS.

Even if PFS will not be the sole arbiter of its financial qualifications, the State and the public--and for that matter the Board too--will be locked out of any financial demonstration that PFS may make at some future date. PFS's commitments merely state it will somehow raise funds. But there are no standards against which an NRC inspector may judge whether such financial arrangements demonstrate whether PFS is financially qualified or whether the form or cost of financial obligations will so burden PFS future revenue stream as to jeopardize the safe operation of the ISFSI.

Furthermore, under PFS's proposal there may need to be multiple future determinations of whether PFS is financially qualified. PFS will obtain a license for a 40,000 MTU facility.

[REDACTED]

The State, following NRC's rigorous procedures, has an admitted contention challenging PFS's financial qualifications under Part 72. Furthermore, the State has reviewed volumes of documents, conducted discovery and hired experts to assist in litigating Contention E. Postponing any financial qualification demonstration until some indeterminate future date after license issuance, is a violation of Intervenors' right to a prior hearing on all financial issues material to the licensing decision, and is totally

contrary to Section 189(a)(1) of the Atomic Energy Act.[15]

It is well-established that "the mechanism of post-hearing resolution must not be employed to obviate the basic findings requisite to an operating license–including a reasonable assurance that the facility can be operated safely without endangering the health and safety of the public." Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 952 (1974).[16] In Public Service of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313 (1978), the Appeal Board found that loan guarantee and financial qualifications could not be left over for post-hearing resolution. The Appeal Board stated, "Those are controversial questions in this proceeding, and the Licensing Board's caution in reserving them for its own resolution was entirely appropriate." 7 NRC at 318.

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[15]In "any proceeding" for the granting of an operating license to a nuclear facility, "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a)(1)(A). The hearing must offer an opportunity for "meaningful public participation." Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1446 (D.C. Cir. 1984), *cert. den.* 469 U.S. 1132 (1985), *quoting* Bellotti v. NRC, 735 F.2d 1380 (D.C. Cir. 1983) (*emphasis in original*). In order to be meaningful, the hearing must be complete in covering the full scope of material issues, and it must be reasonably timed. A meaningful opportunity to be heard means having the opportunity to be heard on "all material factors bearing on the licensing decision raised by the [hearing] requestor." *Id.*, at 1443.

[16]Indian Point further cautions that post-hearing resolution "should be employed sparingly and only in clear cases." Id. When there are "unresolved aspects" of a licensing review, post-hearing resolution is only suitable for "minor procedural deficiencies." Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 543-544 (1983), *quoting* Consolidated Edison Company of New York, 7 AEC at 951-952 and note 8 (minor deficiencies in nonsafety-related equipment program can be resolved by the Staff post-hearing).

Similarly, in this case, the controversy surrounding PFS's demonstration of financial assurance cannot be swept aside in a closeted post-hearing determination without any participation by the Intervenor or the public.

The State does not believe that the Commission had in mind the license conditions proposed by PFS when it commenting in CLI-98-13 at 12, that "[t]he parties and the Board may wish to consider the feasibility of license conditions in this proceeding" and it should not second guess business judgement. The Board should not treat the Commission's remarks as a substantive directive to the Board. In response to correspondence from State officials, the Commission has assured the State that the Commission will not take a position on the merits of the issues before the Board. *See* Letter from Chairman Jackson to Governor Leavitt dated June 19, 1997 ("it would not be appropriate for the Commission to comment or take a position on the merits of the [PFS] proposal at this time."); and letter from Acting Secretary Vietti-Cook on behalf of Chairman Jackson to U.S. Congressman Merrill Cook dated January 29, 1998 ("I trust you will understand that Commissioners must remain impartial in such litigations.") attached as Exh. C. Furthermore, the Commission's statement not to second-guess business judgments, does not mean the Board should adopt PFS's position and make no enquiry at all into PFS's financial plan or its financial qualifications.

In the LES proceeding before the Board, the intervenors had the opportunity for a hearing on the issue of whether the applicant was financially qualified. Moreover, witness were called and cross-examined, the LES financial plan was subject to scrutiny,

and several exhibits were introduced into evidence. *See* LES 44 NRC 331 (1996). By contrast, in this proceeding the Applicant has taken it unto itself to make the pronouncement that the bases of the State's Contention E are moot or irrelevant because of its two unsupported commitments, and therefore PFS has even refused to answer the State's relevant and timely discovery on this issue.

C. Rather than Support the Applicant's Motion for Summary Disposition, the Record, or Lack Thereof, Raises Significant Relevant Factual Questions.

The State attempted to uncover relevant material from PFS during discovery but PFS took it upon itself to pronounce that the admitted bases of Contention E are irrelevant and refused to answer. Now, PFS takes the position of trust us, we can raise sufficient funds and won't construct or operate the PFS facility until we can raise enough money to do so. This cavalier approach to demonstrating financial qualifications has created a total void in the record.

The crux of the Applicant's Motion are the statements in ¶¶ 5 and 7 of the Parkyn Declaration. The Motion is premised on statements that PFS will not commence construction of the ISFSI until it has sufficient funds to construct [**REDACTED**] facility and that it will not accept fuel for storage until it has customer service agreements. Motion at 3; Parkyn Dec. at ¶¶ 5, 7. It is unclear from the Parkyn Declaration whether the statements in paragraphs 5 and 7 are conjunctive or disjunctive such that there would be one combined license condition or two separate stand alone license conditions. The distinction is important because it directly affects when the condition or conditions will

become operative. Moreover, it is unclear what PFS would refrain from constructing until it has sufficient funds because the commitment appears to contradict the license application. *See* State's Material Facts at ¶ 23. In addition, there are no standards or time certain relating to final agency action on financial qualification. Such a procedural posture eviscerates this Intervenor's right to a full and fair hearing.

The State has raised numerous disputed and omitted relevant facts in its appended Statement of Facts. These facts include but are not limited to the structure of the LLC; whether the listed members of PFS will withdraw or have withdrawn from the company; the scope of PFS's commitments and how they will operate; and documentation of PFS's funding sources and the term of such funding.

Also, the documentation in support of the Applicant's Motion, (Parkyn Dec., his curriculum vitae, and PFS LLC Agreement) is deficient.[17] There is no support in the record that Mr. Parkyn is authorized to make any commitments on behalf of the LLC. *See* State's Material Facts at ¶¶ 3-6. For example, there has been no resolution by the Board of Managers binding the LLC to such commitments. Furthermore, the Parkyn Dec. is premised on the declarant being qualified to render opinions about financial planning, marketing and the economics of spent fuel storage.. As support of his professional and

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[17]The declaration must be submitted by a person to show he is competent to testify to all matters discussed in the document. Cleveland Electric Illumination Co (Perry Nuclear Power Plant, Units 1 & 2,) ALAB-443, 6 NRC. 741, 755 (1977) *See* Florida Power and Light Co (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-950, 33 NRC 492, 500-501 (1991).

educational experience, the Parkyn Dec. at ¶ 2, refers to a half page statement attached to the Dec. as Exh. 1. One would need to be clairvoyant to find any meaningful showing of experience or education in that document. *See* also Material Facts at ¶ 2. In addition, the declaration must set forth specific facts rather than mere conclusions and unsupported conclusions must be rejected out of hand.[18] PFS's documentation that it has demonstrated reasonable assurance that PFS will obtain funding is totally conclusary. PFS merely repeats that it will not begin construction until it has funds in hand and makes the same baseless promise with respect to operation and maintenance of the facility. *See* PFS Material Facts at ¶¶ 2, 3, 6 and 8.

The harsh remedy of summary disposition must not be employed when the omitted and disputed material facts cry out for cross-examination of PFS's witness.[19] It is particularly poignant in this case given PFS's imperious attitude towards discovery.

DATED this 27th day of December, 1999.

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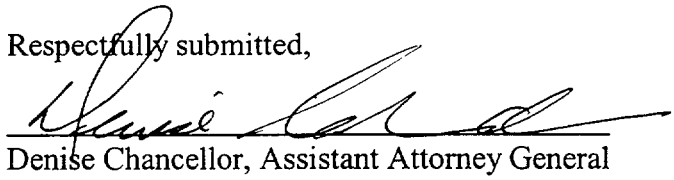
[18]*See* Duplantis v. Shell Offshore, Inc., 948 F.2d 187, 191-92 (5th Cir. 1991) and Public Service Commission of New Hampshire (Seabrook Station, Units 1 and 2), LBP, 88-32A, 17 NRC 1170 at 1177.

[19]*See* Cleveland Electric Illuminating Co (Perry Nuclear Power Plant, Units 1 and 2) ALAB-443, 6 NRC 471, 755 (1977): "[S]ummary disposition is a harsh remedy. It deprives the opposing litigant of the right to cross-examine the witness, which is perhaps at the very essence of an adjudicatory hearing. In such circumstances--even in administrative proceedings where the rules of evidence may be relaxed--it is important that a movant for summary disposition be required to hew strictly to the line set out by our Rules of Practice."

Respectfully submitted,



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AMENDED CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S RESPONSE TO THE APPLICANT'S MOTION FOR PARTIAL SUMMARY DISPOSITION OF UTAH CONTENTION E/CONFEDERATED TRIBES CONTENTION F[20] [Redacted Version] was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 7th day of January, 2000:

Rulemaking & Adjudication Staff
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U. S. Nuclear Regulatory Commission
Washington D.C. 20555
E-mail: hearingdocket@nrc.gov
(*original and two copies*)

G. Paul Bollwerk, III, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: gpb@nrc.gov

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[20] The State's original Response, filed December 27, 1999, contained two documents that may contain information claimed by PFS as proprietary: the State's Disputed and Relevant Material Facts ("Material Facts"), and the Declaration of Michael F. Sheehan (Exhibit A). These two documents were not e-mailed but were faxed to those parties privy to such information. Those parties marked with an asterisk (*) were not served (and will not be served) with a copy of Exhibit A or the Material Facts.

In addition, the State has recalled the entire pleading served December 27, 1999, on persons not privy to PFS confidential information because part of it may contain proprietary information. Those person who returned the recalled documents are being served with the redacted documents and all non-proprietary exhibits. Persons privy to PFS proprietary information are only being served with the portion of the pleading that contains a redacted version of documents already served on them. Mr. Quintana's office is still attempting to locate his copy of the December 27 document; consequently, he is only being served today with this certificate of service. The State will send him the redacted document when he returns to the State his December 27 document.

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