

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)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	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**

COVER PAGE

This pleading consists of the following documents, some of which, as noted below, may contain proprietary information:

1. State of Utah's Response to The Applicant's Motion For Partial Summary Disposition of Utah Contention E/Confederated Tribes Contention F (non-proprietary).
2. State of Utah's Statement of Disputed and Relevant Material Facts (*proprietary*).
3. Declaration of Michael F. Sheehan, Exhibit A (*proprietary*).
4. Declaration of William J. Sinclair, Exhibit B (non-proprietary).
5. Letters from the NRC, Exhibit C (non-proprietary).
6. Declaration of David A. Schlissel, Exhibit D (with Exhibits 1-7) (non-proprietary).

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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 10,000 MTU 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

¹E.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

²See 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

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.

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 assets. 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 safely operate or the abandonment of casks if PFS, without any deep pocket standing behind it, gets into financial straits, 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

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 curies 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, 75, 76.

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 Atomics (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

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.

¹³As 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. In its material facts at ¶ 2, PFS states that it will not commence construction until it has sufficient committed funds to cover the expected cost of a 10,000 MTU facility. Left unresolved is what demonstration or commitments PFS must make for the remaining 30,000 MTU's approved under the license. In addition to the multiple future determinations, PFS commitment-based on a minimum volume of 10,000 MTU contradicts PFS's license application that its nominal target is 15,000 MTU of storage commitments. LA, Rev. 1 at 1-5.

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 Intervenor's 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

¹⁵In "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.

¹⁶Indian 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).

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. 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 a 10,000 MTU 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.

¹⁷The 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).

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 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.

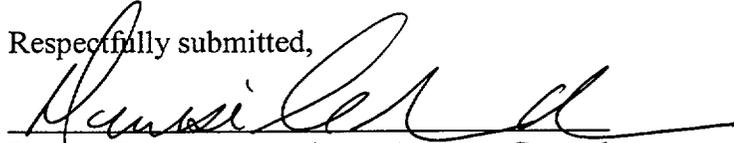
The harsh remedy of summary disposition must not be employed when the omitted and disputed material facts cry out for cross-examination of PFS's witness.¹⁹ It is particularly poignant in this case given PFS's imperious attitude towards discovery.

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."

DATED this 27th day of December, 1999.

Respectfully submitted,

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

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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 F²⁰ was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 27th day of December, 1999:

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²⁰This Response, contains 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 are not being e-mailed but will be faxed to those parties privy to such information. Those parties marked with an asterisk (*) will not be served with a copy of Exhibit A or the Material Facts.

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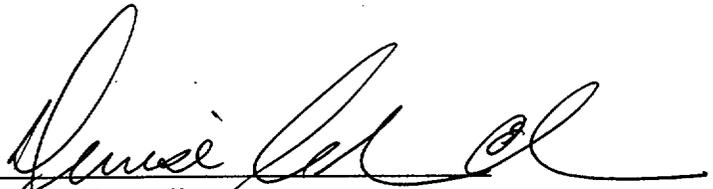
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

**STATE OF UTAH'S STATEMENT OF DISPUTED
AND RELEVANT MATERIAL FACT**

1. The State disputes PFS Material Fact No. 1. The Applicant has omitted, at times with indication, regulatory references in the admitted bases for Contention E. The contention in its entirety is as follows:

Contrary to the requirements of 10 C.F.R. §§ 72.22(e) and 72.40(a)(6), the Applicant has failed to demonstrate that it is financially qualified to engage in the Part 72 activities for which it seeks a license it that:

1. The information in the application about the legal and financial relationship among the owners of the limited liability company (i.e., the license applicant PFS) is deficient because the owners are not explicitly identified, nor are their relationships discussed. See 10 C.F.R. §§ 50.33(c)(2) and 50.33(f) and Appendix C, § II of 10 C.F.R. Part 50.
2. PFS is a limited liability company with no known assets; because PFS is a limited liability company, absent express agreements to the contrary, PFS's members are not individually liable for the costs of the proposed PFSF, and PFS's members are not required to advance equity contributions. PFS has not produced any documents evidencing its members' obligations, and thus, has failed to show that it has a sufficient financial base to assume all obligations, known and unknown, incident to

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ownership and operation of the PFSF; also, PFS may be subject to termination prior to expiration of the license.

3. The application fails to provide enough detail concerning the limited liability company agreement between PFS's members, the business plans of PFS, and the other documents relevant to assessing the financial strength of PFS. The applicant must submit a copy of each member's Subscription Agreement, see 10 C.F.R. Part 50, App. C., § II, and must document its funding sources.
4. To demonstrate its financial qualifications, the applicant must submit as part of the license application a current statement of assets, liabilities and capital structure, see 10 C.F.R. Part 50, Appendix C, § II.
5. The applicant does not take into account the difficulty of allocating financial responsibility and liability among the owners of the spent fuel nor does it address its financial responsibility as the "possessor" of the spent fuel casks. The applicant must address these issues. See 10 C.F.R. § 72.22(e).
6. The applicant has failed to show that it has the necessary funds to cover the estimated costs of construction and operation of the proposed ISFSI because its cost estimates are vague, generalized, and understated. See 10 C.F.R. Part 50, App. C, § II.
7. The applicant must document an existing market for the storage of spent nuclear fuel and the commitment of sufficient number of Service Agreements to fully fund construction of the proposed ISFSI. The applicant has not shown that the commitment of 15,000 MTUs is sufficient to fund the Facility including operation, decommissioning and contingencies.
8. Debt financing is not a viable option for showing PFS has reasonable assurance of obtaining the necessary funds to finance construction costs until a minimum value of service agreements is committed and supporting documentation, including service agreements, are provided.

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9. The application does not address funding contingencies to cover on-going operations and maintenance costs in the event an entity storing spent fuel at the proposed ISFSI breaches the service agreement, becomes insolvent, or otherwise does not continue making payments to the proposed PFSF.
10. The Application does not provide assurance that PFS will have sufficient resources to cover non-routine expenses, including without limitation the costs of a worst case accident in transportation, storage, or disposal of the spent fuel.

In the Matter of Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP 98-7, App. A, 47 NRC 142, 251-252 (1998).

Expertise of PFS's Declarant

2. The Applicant supports its motion with the Declaration of John D. Parkyn. The State disputes that Mr. Parkyn's declaration supports PFS's Motion. There is nothing in the record to show that John D. Parkyn has 32 years experience in the nuclear industry. *See* Parkyn Dec. at ¶ 2. The Applicant refers to Mr. Parkyn's curriculum vitae but this less than one page document is nothing more than a biological sketch of the affiant, such as would be used to introduce a guest luncheon speaker.¹ Parkyn Dec., Exh. 1.
3. The State disputes that the evidence supports John D. Parkyn's statement that "[a]s Chairman of PFS, I am responsible for the operational and managerial matters of PFS." Parkyn Dec. at ¶ 2.
4. The management of PFS by the Board of Managers is contained in Section 7.02 of the LLC agreement. Section 7.02(a) grants the Board of Managers "the right, power and authority to manage, operate and control the business and affairs of the LLC.... Except as otherwise expressly provided in this Agreement or as may be

¹For example, the document contains no dates as to when the affiant obtained his Bachelor of Science degree or held the four listed positions. As to the positions held in nuclear facilities, such as relief shift supervisor, there is absolutely no detail whatsoever other than a job title.

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approved by the Board of Managers, no Member shall have any authority, right or power to bind the LLC...." Parkyn Dec., Exh. 2.

5. Section 7.02(b)(i) of the LLC Agreement contains the composition of the Board of Managers and states: "Each Member whose Class A Percentage Interest equals at least five percent (5%) of the Class A Interests then held by all Members shall be entitled to designate a representative to the Board of Managers (each, a 'Board Member')." *Id.*
6. According to information and belief, John D. Parkyn is Chairman of the Board of PFS. *See* LA, Rev. 1, at 1-9. The powers and authority of the Chairman of the Board are contained in section § 7.02(d)(i) of the LLC Agreement. The State disputes that the Chairman of the Board of PFS has the independent authority to make the commitments contained in the Parkyn Declaration, or relied upon in the Applicant's Motion for Summary Disposition.
7. The composition of the Board of Managers, as contained in § 7.02(b)(i) of the LLC Agreement, requires reference to Exhibit A of the LLC Agreement. *See* definition of "Class A Percentage Interest" in Add. I. Exhibit A to the LLC Agreement was not included in Exh. 2 to the Parkyn Dec.

General Facts

8. The activities for which the Applicant seeks a license from the U.S. Nuclear Regulatory Commission are to permit Private Fuel Storage, L.L.C., to construct, operate and decommission an independent spent fuel storage installation on the Skull Valley Indian Reservation, Utah. LA, Rev. 2, at 1-1.
9. Critical to PFS's operation is the ability to ship spent nuclear fuel casks for commercial nuclear reactors in the United States to the Skull Valley storage site. PFS will construct and operate a rail spur from the Union Pacific mainline at Low, Utah, to the PFS facility. SAR, Rev. 3, at 1.1-2. PFS will also construct and operate an intermodal transfer facility at Rowley Junction where casks will be off-loaded from rail car to heavy haul truck for transportation along Skull Valley Road to the Skull Valley site. *Id.*

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10. In addition to raising funds for construction of the ISFSI, PFS must also address how it will raise funds to construction and operate the rail spur and the intermodal transfer facility. Sheehan Dec. at ¶ 14, attached as Exh. A.
11. PFS lacks independent assets which may result in it cutting corners to minimize costs and thereby compromise safety. Sheehan Dec. at ¶ 10.
12. Because PFS obtains its financial support from member contributions or anticipated Service Agreements, all debt incurred, including construction and operation of the rail spur and the intermodal transfer facility, decommissioning, lease payments, and liabilities, including accident liability, must be funded from the same source. Sheehan Dec. at ¶¶ 9.c., 12.
13. 10 C.F.R. § 72.22(e) requires that PFS demonstrate that it has the required financial qualifications by showing that the applicant either possesses the necessary funds, or that the applicant has reasonable assurance of obtaining the necessary funds.

Pre-construction Commitment

14. The State disputes Material Fact No. 2. The commitment in ¶ 2 of the Applicant's Statement of Material Facts does not provide reasonable assurance as required by Part 72 that PFS will be able to obtain the funds to build the PFS facility.
15. If NRC accepts PSF's commitments, a license will be issued without any determination whatsoever that PFS has met 10 C.F.R. § 72.22(e) requirements. *See* Sheehan Dec. at ¶¶ 7, 9.a., 9.g.
16. Before any license conditions can be approved, there must be a proceeding and a record to document how PFS at some undetermined future time will demonstrate it meets the requirements of 10 C.F.R. 72.22(e). *See* Sheehan Dec. at ¶¶ 9.a., 9.i.
17. Without any demonstration of financial assurance, except a vague promise not to commence construction unless there are sufficient funds to do so, there are no standards by which the NRC or an intervenor may judge whether PFS is financially qualified to undertake the construction, operation and decommissioning of a 40,000 MTU ISFSI. Sheehan Dec. at ¶¶ 8, 9.g., 9.h. PFS's

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unsupported commitment lacks any standards to demonstrate that PFS will have sufficient funds that meet the requirements of 10 C.F.R. § 72.22(e). *See* PFS Statement of Material Facts ¶ 2.

18. There is no need to accept an unsupported commitment as an adequate demonstration of financial assurance. The eight listed members of PFS have a projected spent nuclear fuel storage need of approximately 13,000 MTUs. ER, Rev. 6, at 1.2-8. PFS could demonstrate financial assurance with committed member Subscription and Service Agreements for over 10,000 MTUs. *See* Sheehan Dec. at ¶¶ 15-19.
19. PFS's commitment in ¶ 2 of the Applicant's Statement of Material Facts on its face is not clear and the terms are not defined. Construction of the facility could occur without the necessary financial depth to build the facility to a level that would adequately protect the public health and safety because the commitment does not define "funds sufficient" or establish a standard to meet 10 C.F.R. § 72.22(e) requirements at some unspecified future time of construction. *See* Sheehan Dec. at ¶¶ 9.a., 9.h.
20. The PFS commitment does not clearly delineate the term "construction of an ISFSI." *See* Applicant's Statement of Material Fact at ¶ 2. It is unclear whether PFS will defer construction of the "ISFSI" until adequate funds for all construction activities are available (e.g., the rail spur, the intermodal transfer facility, and the ISFSI itself). If PFS is unable to raise funds to construct the rail spur or the intermodal transfer facility, PFS must either use funds set aside for construction of the ISFSI, which may compromise public health and safety, or the ISFSI will not be able to operate without a mechanism to transport casks to the site. *See* Sheehan Dec. ¶ 14.
21. PFS's commitment states: "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 operation costs during construction of the project) with an initial capacity of at least 10,000 MTUs . . ." Parkyn Dec. ¶ 5.
22. It is unclear whether the term "not commence ISFSI construction" modifies only the ISFSI itself, or all construction, until "sufficient" funds are committed.

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Sheehan Dec. at ¶ 9.a. In its license application PFS states that it plans to start construction on the access road, the Low rail corridor, and the storage facility, including the canister transfer building, security and health physics building, storage pads, and site infrastructure in September 2000. ER, Rev. 1, at 1.3-1 to Rev. 2 at 1.3-2. PFS also plans to initiate construction on the intermodal transfer facility in January 2001. ER, Rev. 2, at 1.3-2. Under the current schedule, the Board's initial decision is due October 1, 2001. *See* General schedule appended to the Board's Order dated September 20, 1999. The commitment appears to contradict the license application.

23. PFS's commitment that restricts construction until it can fund a 10,000 MTU facility is inconsistent with statements in its license application. Parkyn Dec. at ¶ 5. In the License Application, PFS states that "[n]o construction will proceed unless Service Agreements committing for a significant quantity of spent fuel storage have been signed." LA, Rev. 1, at 1-5. PFS further states that "[t]he nominal target is 15,000 MTU of storage commitments." *Id.*
24. The commitment in ¶ 2 of the Applicant's Statement of Material Facts does not consider the pre-construction debt and non-construction obligations which could be carried over into the operational phase which may affect safe operations. PFS has substantial pre-construction and non-construction obligations, such as licensing and lease payments, that could affect PFS's financial base. *See* Sheehan Dec. at ¶¶ 9.j., 9.m.

Pre-operation Commitment

25. The State disputes Material Fact No. 3. The commitment in ¶ 3 of the Applicant's Material Facts does not provide reasonable assurance that PFS will be able to obtain the funds to build the PFS facility. *See also* Utah Material Facts ¶¶ 16, 17 above.
26. PFS estimates construction costs for the PFS facility at \$100 million. LA, Rev. 1, at 1-5. PFS hopes that it will fund facility construction costs of the PFS facility with \$6 million in equity contributions from PFS members or Service Agreements with customers (including both PFS members and non-members). *Id.* PFS may also fund construction with "other committed forms of financing, such as commercial bank financing or the issuance of bonds." Parkyn Dec. at ¶ 5.

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27. The commitment in ¶ 3 of the Applicant's Material Facts is ambiguous in that it does not clearly obligate PFS to recover all costs of operating and maintaining the facility, but only those costs "with respect to the spent fuel to be accepted and stored under the contracts" in force at the time. *See* Sheehan Dec. at ¶ 9.e. The commitment does not address how fixed operating and maintenance costs will be covered. Sheehan Dec. at ¶¶ 9.e., 9.l., 9.m.
28. The commitment in ¶ 3 of the Applicant's Material Fact relies on Service Agreements. Applicant's Statement of Material Fact at ¶ 3. The form or substance of the Service Agreements is unknown and therefore, cannot be evaluated to determine whether reliance on Service Agreements meets the requirements of 10 C.F.R. § 72.22(e). Sheehan Dec. at ¶¶ 9.f., 9.o., 15.
29. The Commitment in ¶ 3 of the Applicant's Statement of Material Facts fails to address how operational costs will be funded in the initial years when there will be very few casks among which to distribute fixed costs. PFS states that it has a capacity of handling approximately 100 to 200 casks per year. SAR, Rev. 4, at 1.4-2. If PFS can only handle 100 to 200 casks per year there will be an insufficient revenue stream from storage fees to fund operation and maintenance of the facility in the early years of operation. *See e.g.*, Sheehan Dec. at ¶¶ 9.e., 9.k.
30. The Commitment in ¶ 3 of the Applicant's Statement of Material Facts omits how PFS will ensure that annual storage fees are paid by customers and what action PFS will take with respect to operational costs of stored fuel from defaulting customers. *See* Applicant's Statement of Material Facts at ¶ 3. *See also* Sheehan Dec. at ¶ 20.
31. The Commitment in ¶ 3 of the Applicant's Statement of Material Facts does not address a relevant material issue: annual storage fees from decommissioned reactors. PFS will accept casks for storage from decommissioned reactors. ER, Rev. 6, at 1.2-6. Current PFS members own three shutdown nuclear reactors at Indian Point 1, LaCrosse, and San Onofre 1. ER, Rev. 6, at 1.2-2. To complete decommissioning, the three shutdown reactors must remove the spent fuel offsite. *Id.* at 1.2-5. PFS also states that "[e]ach of the PFS members that have fuel on-site (20 units) will reach the end of their operating license prior to the capability

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of the DOE's facility to remove all accumulated fuel from the individual sites." *Id.* at 1.2-4 to -5. A demonstration of financial assurance must include a plan for dealing with casks stored at PFS from a decommissioned utility that may default on annual storage payments. Sheehan Dec. at ¶ 20.

32. The commitment in ¶ 3 of the Applicant's Material Facts is not adequate because it does not address debt incurred during the construction phase. *See* Sheehan Dec. at ¶ 9.b. The operation of the PFS facility could occur without sufficient income to cover both the construction debt and the operation costs. *Id.* Commencement of operation laden with debt from construction, cask manufacturing, and transportation may place PFS in a financial bind and, thereby, compromise safety. *Id.* ¶¶ 10, 12.
33. The Commitment in ¶ 3 of the Applicant's Statement of Material Facts is incomplete because it does not address how existing liability and debt, including construction debt, in addition to anticipated costs, will be distributed among Service Agreement revenue. *See* Applicant's Statement of Material Fact at ¶ 3. *See also* Sheehan Dec. at ¶¶ 9.b., 9.c., 9.e., 9.f., 9.j., 9.k., 9.l., 9.m., 9.o. In addition, PFS has omitted any description of contingencies for unanticipated costs after Service Agreements with established costs have been entered into. Sheehan Dec. at ¶¶ 9.c., 9.d., 9.o.
34. The Commitment in ¶ 3 of the Applicant's Statement of Material Facts does not describe how the acceptance of spent fuel at the proposed Yucca Mountain repository will impact the projected annual revenue needed to operate, maintain, decommission the PFS facility, and transfer casks from the PFS facility. *See* Applicant's Statement of Material Facts at ¶ 3.
35. The Commitment in ¶ 3 of the Applicant's Statement of Material Facts has not defined the minimum credit standards required. For example, what undertakings would require advance payments, third party guarantees, irrevocable letter of credits, or performance bonds. *See* Applicant's Statement of Material Facts at ¶ 3. *See also* Sheehan Dec. at ¶ 13.
36. Although PFS is seeking a license to store 40,000 MTUs of spent nuclear fuel, the Commitment in ¶ 3 of the Applicant's Statement of Material Fact neglects to establish funding levels for a specified quantity of fuel. As such multiple future

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determinations of financial assurance may need to be made to permit the Applicant to move forward with additional storage. *See Applicant's Statement of Material Facts at ¶ 3. See also Sheehan Dec. at ¶¶ 9.e., 9.h.*

37. The Commitment in ¶ 2 of the Applicant's Statement of Material Facts restricts construction until PFS has sufficient funds to construct a 10,000 MTU ISFSI, not a 40,000 MTU ISFSI. *See Applicant's Statement of Material Facts at ¶ 2. The Commitment in ¶ 3 of the Applicant's Statement of Material Facts says "additional construction . . . will be funded through equity contributions, the Service Agreements, or other committed forms of financing." Additional construction may require multiple future financial assurance determinations. See Sheehan Dec. at ¶ 9.i.*
38. In the event NRC does not make future financial determinations prior to PFS's construction and operation, PFS will be the sole arbiter of whether PFS itself is financially qualified and meets the requirements of 10 C.F.R. § 72.22(e). *See Sheehan Dec. at ¶ 9.i.*

PFS Members

39. The State disputes Material Fact No. 4. Of the eight utilities that PFS maintains are owners of PFS, there are questions about whether some of those owners are still consortium members. Illinois Power, one of eight PFS members, sold its only nuclear reactor and no longer has a need for spent nuclear fuel storage at the PFS facility. *Schlissel Dec at ¶ 6, attached as Exh. D.*
40. GPU, Inc., also one of eight PFS members, has sold its nuclear reactor at Three Mile Island Unit 1 and has entered into an agreement to sell Oyster Creek. *Schlissel Dec. at ¶¶ 3-4. Once GPU, Inc. completes the sale of Three Mile Island Unit 1 and Oyster Creek, it will no longer have a need for spent nuclear fuel storage at the PFS facility. Schlissel Dec. at ¶ 5.*
41. Consolidated Edison of New York, another PFS member, is also contemplating selling its remaining reactors and eliminating its need for spent nuclear fuel storage. *Schlissel Dec at ¶ 7.*

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42. The State disputes Material Fact No. 5. It is not a material fact that PFS has submitted a Limited Liability Agreement to the NRC Staff. The Limited Liability Agreement that is attached as Exhibit 2 to the Parkyn Dec., consisting of the main body of the agreement and Addendum I (definitions), is the only record before the Board.
43. The State disputes that the Limited Liability Agreement, Exh. 2 to Parkyn Dec., adequately discusses the relationship among the PFS owners. The Agreement is incomplete. Not all addenda and no exhibits are attached to the Agreement. *See* Table of Contents and Agreement at §§ 5.01 and 5.02, which refer to Exhibit A (Step II and Step IV Capital Contributions); § 5.04 (c)(iii), which refers to Exh. F (Capital Contributions); Add. I definition of "interested utility subscription agreement," which refers to Exh. C; Add. I definition of "Member Subscription Agreement," which refers to Exh. B.
44. Without a complete copy of the Limited Liability Agreement, including all addenda and exhibits, it is not possible to evaluate the relationship among the PFS owners.

Financial Base

45. The State disputes Material Fact No. 6. PFS's commitment in Material Fact No. 6 does not show that PFS's financial base is sufficient to assume the obligations incident to ownership and operation of the proposed PFS facility. *See* Sheehan Dec. at ¶¶ 6-9, 14, 21.
46. The State disputes that the commitments referenced in Applicant's Material Facts ¶ 6 address "amortization of any debt financing." *See* Applicant's Statement of Material Facts at ¶¶ 2, 3, and 6. *See also*, Parkyn Dec. at ¶ 14.

Termination

47. The State disputes material fact No. 7. There is no assurance that PFS will not be subject to termination before the expiration of the ISFSI license for the Skull Valley site. Nor is there any assurance that PFS will not be subject to termination prior to the removal of all casks from the Skull Valley site.

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48. According to Section 10.01 of the LLC Agreement, Exh. 2 to the Parkyn Dec., the PFS limited liability company (LLC) may terminate upon the occurrence of any of the following events:
- 10.01(a) the consent in writing to dissolve and wind up the affairs of the LLC by one hundred percent (100%) of the Class A Percentage Interests;
 - 10.01(b) the sale or other disposition by the LLC of all or substantially all of the LLC Assets and the collection of all amounts derived from any such sale or other disposition, including all amounts payable to the LLC, under any promissory notes or other evidences of indebtedness taken by the LLC, and the satisfaction of contingent liabilities of the LLC in connection with such sale or other disposition (unless the Members shall elect to distribute such indebtedness to the Members in liquidation);
 - 10.01(c) the Termination Date; or
 - 10.01(d) the occurrence of any event that, under the Delaware LLC Act, would cause the dissolution of the LLC or that would make it unlawful for the business of the LLC to be continued.
49. PFS may be terminated, at any time, by the consent in writing of certain members. LLC Agreement § 10.01(a)
50. The record in support of summary disposition is incomplete because one of the events which may cause termination, as described in § 10.01(a) of the LLC Agreement, requires reference to Exhibit A of the agreement. *See* Definition of "Class A Percentage Interest" in Addendum I which refers to Exhibit A. There is no Exhibit A attached to the LLC Agreement.
51. Under § 10.01(b) of the LLC Agreement, the LLC may be terminated upon "the sale or other disposition by the LLC of all or substantially all of the LLC assets" and the collection of debts, and thus, the PFS limited liability company may reasonably be subjected to termination prior to the end of the license term.
52. According to Addendum I of the LLC Agreement, the definition of "termination date" is fifty years from the formation date; the definition of "formation date" is September 6, 1995. Under the LLC Agreement currently before the Board, PFS

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will automatically terminate on September 6, 2045. The dates upon which NRC issues an initial and a renewal Part 72 license to PFS may be such that under the LLC Agreement PFS will automatically terminate prior to the end of the two 20 year license terms.

53. Members of PFS have the right to withdraw from the limited liability company at any time upon written notice to the other Members. LLC Agreement at § 9.03(a). Thus, any or all of the current eight members may withdraw from the PFS leaving the company with few, if any, members.
54. The State disputes the statement "the Service Agreements between PFS and its customers will require PFS to remain in existence to provide the agreed upon spent fuel storage services" in ¶ 15 of the Parkyn Dec. because there is nothing in the record as to the contents or substance of any Service Agreement. Sheehan Dec. at ¶ 15.

Financial Assurance

55. The State disputes Material Fact No. 8. No financial assurance "flows" from PFS's commitments. *See* Statement of Material Facts ¶¶ 15-24, 26-38 above.
56. The Parkyn Dec. at ¶ 17 does not support Material Fact No. 8. Mr. Parkyn states that PFS "has already provided the NRC Staff with the PFS LLC Agreement and pro forma member subscription agreements." The preceding sentence in ¶ 17 of Mr. Parkyn's declaration refers to Service Agreements, not subscription agreements.
57. In order to determine any "flow" from PFS's commitments, the Applicant must produce a copy of each member's subscription agreement and document its funding sources, such as produce copies of Service Agreements. *See* Contention E, Basis 3 in ¶ 1, above. *See also*, Sheehan Dec. at ¶¶ 9.o., 12, 15, 21.

Liabilities

58. The State disputes Material Fact No. 9. PFS's liabilities may be significant and must be evaluated to determine if they will impair funding of construction,

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operation, maintenance, decommissioning, and transportation services. *See* Sheehan Dec. at ¶¶ 9.j., 9.k., 9.l., 9.m., 9.n., 9.o.

Accident Recovery

59. The State disputes Material Fact No. 10. If NRC accepts PFS's commitments as satisfying financial assurance requirements, NRC will defer making a financial assurance demonstration until some indeterminate future date after license issuance. Based on the State's experience with the Atlas site, NRC's deferral of financial assurance decisions has resulted in lack of funding to address significant health and safety impacts. *See* Sinclair Dec., attached as Exh. B.
60. PFS has no assets of its own and no deep pockets which ensure responsibility for accident recovery or funding shortfalls. *See* Sheehan Dec. at ¶¶ 9.c., 9.n., 9.o., 10.

Insurance

61. The State disputes Material Fact No. 11. Onsite property insurance and offsite liability insurance policies and premiums have not been introduced into evidence.
62. Parkyn's Declaration, ¶ 21 does not support PFS Material Fact No. 11. PFS does not in fact commit to a specific amount of onsite property or offsite liability insurance. Rather, PFS states that it "*currently contemplates* that it will maintain" specific amounts of onsite property and offsite liability insurance. Parkyn Dec. at ¶ 21 (*emphasis added*).
63. NRC has not specified acceptable amounts of onsite property or offsite liability insurance for a centralized ISFSI storing up to 40,000 MTU of spent nuclear fuel. Parkyn Dec. at ¶ 21.
64. PFS justifies its "contemplation" of specific amounts of onsite property and offsite liability insurance as "sufficient to cover the cost of accident recovery at the PFSF" based on an NRC proposed rule concerning Financial Protection Requirements for Permanently Shutdown Nuclear Power Reactors. Parkyn Dec. at ¶ 21.

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65. NRC categorically states that the proposed rule on Financial Protection Requirements for Permanently Shutdown Nuclear Power Reactors "does not address the financial protection requirements for Independent Spent Fuel Storage Installations (ISFSIs)." 62 Fed. Reg. 58,690, 58,690-91. NRC further states financial protection for ISFSIs "will be addressed after efforts dealing with technical and licensing issues for ISFSIs are resolved in areas of safeguards requirements, emergency planning, and potential fuel storage handling activities." *Id.* at 58,691.
66. The preamble to the proposed rule on Financial Protection Requirements for Permanently Shutdown Nuclear Power Reactors indicates that the "preservation of the solvency of the organization responsible for maintaining and decommissioning [the] facilities in the unlikely event of a nuclear incident" must be accounted for when considering the level of insurance required. 62 Fed. Reg. 58,690.
67. PFS proposes to store up to 40,000 MTUs of spent nuclear fuel. SAR, Rev. 0, at 1.2-1. No currently licensed or proposed ISFSI will come close to storing that amount of fuel. Any insurance amounts accepted at currently licensed ISFSIs are not applicable at a centralized storage facility storing up to 40,000 MTUs. *See* Sheehan Dec. at ¶ 22.

Need for Marketing

68. The State disputes PFS Material Fact No. 12. PFS's commitments regarding the financing of construction, operation, and maintenance of the PFS facility do not meet the 10 C.F.R. § 72.22(e) requirements. *See* Utah Material Facts ¶¶ 15-24, 26-38 above.
69. Because PFS has no current independent assets of its own and no committed Service Agreements, PFS must demonstrate financial assurance by showing it has an adequate market to generate an income stream from Service Agreements. *See* Sheehan Dec. at ¶ 21.

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Debt Financing

70. The State disputes PFS Material Fact No. 13 because PFS has offered no support for its claim that its commitment will raise sufficient revenue, including debt financing, to begin construction without compromising health and safety. Sheehan Dec. at ¶ 9.b.
71. The use of debt financing to fund construction could burden PFS with substantial debt that operation of the ISFSI could go forward without sufficient revenues to cover both construction debt and the operation and maintenance costs of operation. *See* Sheehan Dec. at ¶¶ 9.b., 9.k.

Breach of Payment

72. The State disputes PFS Material Fact No. 14.
73. PFS maintains that payments for spent fuel storage will be made pursuant to Service Agreements. Sum. Disp. Parkyn at ¶ 6. There are no Service Agreements in evidence to evaluate the breakdown and assessment of costs.
74. Service Agreement Payments will be divided between Base Storage Fees and Annual Storage Fees. Sum. Disp. Parkyn at ¶ 6. Annual Storage Fee will cover the operating and maintenance cost and are to be paid annually, not prior to receipt of the customer's fuel. Parkyn Dec. at ¶ 8.
75. Reactors planning to decommission will likely store waste at the ISFSI. *See* ¶ 31 above. PFS has not established a payment scheme for those reactors who plan to decommission before the end of the potential 40 year license period. Decommissioned reactors will not be available to pay their Annual Storage Fee on an annual basis.
76. Spent fuel cannot be returned to decommissioned sites. Spent fuel from decommissioned sites cannot be returned for failure to pay Annual Storage Fee. Sheehan Dec. at ¶ 20.
77. PFS has also failed to account for any uncollectible accounts which will impact the ability to adequately finance the operations. *See* Sheehan Dec. ¶ 20.