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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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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

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DECLARATION OF MICHAEL F. SHEEHAN, Ph.D.

I, MICHAEL F. SHEEHAN, Ph.D., hereby declare under penalty of perjury and pursuant to 28 U.S.C. § 1746, that:

1. I am the managing partner of Osterberg and Sheehan, Public Utility Economists, a private consulting firm specializing in regulatory policy, economics and finance. My curriculum vitae listing my qualifications, experience, training, and publications has already been filed in this proceeding. See, Exhibit No. 2 of the "State of Utah's Objections and Responses to Applicant's Second Set of Discovery Requests With Respect to Groups II and III Contentions," dated June 28, 1999.
2. I hold B.S., M.A. and Ph.D. degrees in economics from the University of California at Riverside. I have taught project analysis, quantitative economics, and operations research, as well as basic, intermediate, and graduate courses in economic theory and policy at the Graduate School of Administration at the University of California at Riverside; at California State College, San Bernardino; and in the Graduate Program at Chapman College. In 1979 I joined the Graduate Program in Urban and Regional Planning at the University of Iowa, where I taught courses in environmental policy and planning, public utility policy and planning, planning economics, local energy planning, and state and local development finance. I have published a substantial number of articles in scholarly journals and a number of chapters in books.
3. Much of my practice over the last twenty years has been involved with the

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economics and finance of project planning and regulation. This has included high and low level radioactive waste issues in the west and midwest, the economics of power supply in the event of early closure of nuclear plants, financial qualifications and other issues in the context of the nuclear fuel enrichment, and uranium mining involving issues of financial qualification, cost-benefit analysis and NEPA. In addition, I have testified before public service commissions in more than a dozen different states on utility planning, rate design, cost allocation, and other aspects of utility regulation.

4. From about 1982 I have been involved in several studies involving the economics of utility franchises. I was a member of the Iowa City, Iowa Franchise Review Committee in 1983-4, and I am co-author of an article in the *Urban Lawyer* on utility franchise fees. I have been an economic consultant on issues related to municipal solid waste disposal to METRO, the regional government for the three counties around Portland, Oregon, and I am currently chairman of the Solid Waste Advisory Committee for Columbia County, Oregon. I have served on the Rate Advisory Committee and the Resource Acquisition Council of the Columbia River PUD, the Research Advisory Committee of NRRI and the National Consumer Advisory Panel to AT&T.
5. I have reviewed Private Fuel Storage's ("PFS's") summary disposition filing. I am familiar with the circumstances and materials in this case generally, and specifically as they relate to Contention E. I have read the materials filed by PFS in support of its motion for Summary Disposition on Contention E. I am familiar with PFS's License Application in this proceeding. I am also familiar with and have reviewed the documents that PFS has provided to the State of Utah concerning Utah Contention E, PFS's responses to Discovery Requests submitted by the State, and PFS's responses to the NRC Staff's Requests for Additional Information.

### PFS Commitments

6. Section 10 CFR § 72.22(e) requires that PFS "demonstrate" that it "has" the required financial qualifications. The information must show that the applicant either possesses the necessary funds, or that the applicant has reasonable assurance of obtaining the necessary funds . . ."

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7. The commitments PFS is proposing are ambiguous. There are two possibilities: The first is that the adoption of the proposed commitments as license conditions would simply *delay until later* the required finding by the Board that the criteria set forth in § 72.22(e) are met. The second possibility is that PFS is asking the Board to waive the decision criteria in NRC rule § 72.22(e) altogether.
8. Assuming that the first alternative is the correct one, it is unclear what PFS will have to show before the Board will allow it to go forward with construction and operation. The language submitted by PFS does not provide the detail of the process that will occur when PFS comes in at a later date to demonstrate that the terms of the proposed conditions have been met within the context of the criteria of 10 C.F.R. § 72.33(e). Nor is there any provision in part 72 that explains how to resume the adjudicatory process when compliance with the showing required by an NRC rule has been deferred to a later date.
9. By proposing the commitments, PFS is attempting to substitute one combined or two separate license conditions for the findings required by the rule. However, any license conditions premised on PFS's commitments do not provide an equivalent level of assurance that the public health and safety will be protected. This is so for at least the following reasons:
  - a. PFS's statement that construction would only go forward if sufficient resources were available is so vague as to include the possibility that "sufficient" resources would allow PFS to build the facility on a shoestring and cut corners, without the necessary financial depth to build it to the level to adequately protect the public health and safety. There is not enough detail in the commitment to determine whether the funding would be sufficient to meet the Part 72 standard at the unspecified time construction were to be initiated. The commitment does not specify a level of funding. It is unclear whether the commitment requires PFS to obtain only the \$100 million construction amount mentioned in various materials, or an unspecified and undetermined "sufficient" amount to be provided at an unspecified future date. LA, Rev. 1, at 1-5. The level of funding is especially significant since there would be no proceeding at the time to allow a full review of adequacy as contemplated by 10 C.F.R. § 72.22(e).

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- b. PFS proposes that it would not build the facility before the necessary funds were available. PFS says, however, that it might finance the construction through loans or bonds. Parkyn Dec. at ¶ 5. Construction loans or bonds might satisfy, superficially, the first commitment to allow construction to occur. The second commitment is that PFS would not go forward with operation until it had in hand sufficient Service Agreement commitments to fund *operation*. Thus, the *operation* of the facility could go forward without a sufficient income stream to cover *both* the construction debt service (including ratio requirements) and the operation and maintenance ("O&M") components of the operation. Therefore, PFS's commitments are insufficient in and of themselves to provide reasonable assurance of adequate funds for both construction *and* operation.
- c. The level of funds necessary to demonstrate the financial capability to construct and operate the facility so as to protect public health and safety depends, in part, on certain contingent events which are at issue in this proceeding. For example, PFS has not demonstrated that it has the financial resources to construct the facility so as to eliminate the risk to the public from an accident such as a cruise missile or armed military aircraft crashing into spent nuclear fuel casks with substantial off-site release of radioactivity. All costs, including those associated with contingent events and liabilities must be covered in the end out of PFS's income stream. This income stream must be reviewed to determine whether or not PFS possesses the necessary funds or has reasonable assurance of obtaining the necessary funds.
- d. Nor has PFS demonstrated that it will have the necessary liability insurance to cover off-site losses from an on-site accident. There is no mention of insurance coverage in the commitments. Parkyn states that "PFS currently *contemplates*" that it will maintain a specific amount of property and nuclear liability insurance. Parkyn Dec. at ¶ 21 (*emphasis added*). Furthermore, Parkyn says only that PFS will have insurance and it will exceed the insurance levels required by the NRC. Parkyn Dec. at ¶¶ 20-21. PFS concedes, however, that the NRC does not require *any* amount of on-site property insurance or liability insurance. Parkyn Dec. at ¶ 20. Thus, there is no basis for Parkyn's claim that PFS will have insurance that will be "more than sufficient." Moreover, there

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are significant ramifications of not having sufficient insurance or other resources to operate without harm to public health and safety because the public will then be held at risk without the protections guaranteed by 10 CFR § 72.22(e). Any large accident with off-site consequences could then result in unrecoupable losses to the public, with PFS later employing the legal defense that since it had met all the requirements imposed by the NRC, it is exempt from liability. It is worth noting that PFS does not include in the language of its proposed commitments any commitment as to insurance.

- e. The language in the second proposed commitment states: "PFS will not commence operations of the PFSF, and will not accept spent nuclear fuel for storage at the PFSF, unless PFS has in place long term Service Agreements for spent fuel storage services with its members and customers sufficient to cover the costs of operating and maintaining the facility *with respect to the spent fuel to be accepted and stored under the contract...*" Parkyn Dec. at ¶ 7 (*emphasis added*).

This ambiguous language does not clearly obligate PFS to recover *all* costs of operating and maintaining the facility, but instead only those costs "*with respect to the spent fuel to be accepted and stored under the contracts*" in force at the time. For example, if only 200 MTU of spent fuel are sent to PFS in the first year, under PFS's commitment, PFS would be entitled to operate if the revenues from the Service Agreement for 200 MTU of spent fuel were adequate to cover the *incremental* cost of the 200 MTU of fuel. This commitment is at best ambiguous as to how the *fixed* O&M and other fixed costs of the facility will be funded.

- f. The operations commitment relies on the ability of PFS to generate adequate revenues through Service Agreements. However, PFS has refused to provide the State with a copy of the Service Agreement pursuant to discovery. Applicant's Objections and Proprietary Responses to State's Second Requests for Discovery (Groups I and II), dated June 28, 1999, at 7, Document Request No. 8 (hereinafter "PFS Response Second Set"); and Applicant's Objections and Responses to State of Utah's Fourth Set of Discovery Requests ..., dated December 6, 1999, at 12, Document Request No. 5 (hereinafter "PFS Response Fourth Set"). What the Service Agreement does or doesn't require is a

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critical part of finding whether PFS meets the requirements of 10 CFR § 72.22(e). Furthermore, there is no evidence that a Service Agreement exists; or if it does exist, whether it says what PFS claims it says (or will say).

- g. Without any demonstration of financial assurance, except a vague promise not to commence construction and later operation 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. This effort to make an end run around the Part 72 rules on financial assurance is an attack on the rules themselves.
- h. The promise not to begin construction prior to having "sufficient" funds (Parkyn Dec. at ¶ 5) to construct the facility begs the question of what will be "sufficient" at the time PFS determines to go forward with its license. If PFS decides to go forward 10 years from now, there are no standards in place that establish whether it will be sufficient if PFS has accumulated only the funds that it is basing its current estimates on, as filed in this case. Another anomaly created by PFS's proposal is that NRC will issue a license for a 40,000 MTU facility based on two commitments relating to a 10,000 MTU facility.
- i. The proposed commitments do not provide a mechanism for later NRC review under Part 72 to verify that PFS's plans in a world with different costs and technologies are adequate. In addition, the commitments do not foresee a proceeding to allow interested parties to participate in the final financial assurance determination. Without a licensing proceeding, the Board and the State of Utah cannot know whether the prices PFS says it will charge and the costs it estimates, will continue over time to be reasonable. PFS is attempting not only to move the *time* when the test is to be applied into the indeterminate future, but also asserting that PFS should be the arbiter of whether the approval criteria set forth in § 72.22(e) are met at that future time. There is to be no later proceeding. This is not a simple motion to adjourn this proceeding to a later time, but instead, a bold request to be given the license without ever having to meet the criteria set forth in § 72.22(e).

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- j. The commitments do not address pre-existing liabilities at the time of construction or operation. PFS claims that it "has no liabilities and will have no liabilities other than those relating to providing spent fuel storage services . . ." Parkyn Dec. at ¶ 18. Yet, PFS has other contractual obligations that must be paid from the same construction and operation income stream. An example of a pre-construction obligation is the cost of pre-licensing technical work performed by Stone & Webster Engineering Corporation in support of PFS's license application, including its Safety Analysis Report. *See e.g.*, various Calculation Packages prepared by Stone & Webster and submitted to the NRC on behalf of PFS. Another example is PFS's contractual obligation to remove the 500 heavy concrete pads at the site at the close of operations at the option of the Skull Valley Band of Goshutes. PFS Response Fourth Set, at 8, Admission Request No. 13. Regardless of PFS's claims that its contractual obligations are not part of financial assurance, they are, nonetheless, PFS liabilities.
- k. The statement that "PFS has and will have no liabilities other than that of providing spent fuel storage and related services to its customers for which payment will be made under the Service Agreement" (Parkyn Dec. at ¶ 18) suggests that all liabilities will have a paired revenue stream from PFS customers. Nothing in the two proposed commitments compels such a result. For example, the commitments as license conditions would allow PFS to go forward with the construction of the facility with debt financing in a situation where PFS had received insufficient Service Agreement revenue from customers. *See, e.g.* Parkyn at ¶ 29. In such a case PFS would have liabilities in excess of its assets in the form of a committed revenue stream. Moreover, having the obligation to meet defined annual debt service payments regardless of income would put pressure on PFS to offer more attractive terms – including lower prices – to attract revenues.
- l. There are many other examples of liabilities without a corresponding revenue stream. Lease payments to the Skull Valley Band of Goshutes begin on the first day that any amount of spent nuclear fuel is received at the site, and are fixed in amount regardless of the volume of spent nuclear fuel received at the site, *i.e.* the payments are not proportional to the revenue stream. Furthermore, there are substantial contingent

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liabilities under the lease agreement with respect to site clearance at the end of the license period.

- m. Fixed O&M expenses begin with the acquisition of the site and are not proportional to the volume of waste stored at the facility. Again the existence of the liability does not bring with it a corresponding and offsetting income stream. The same with LLC overhead expenses, taxes, NRC fees, legal fees, working capital requirements, insurance expense, and a substantial share of employee-related expenses.
- n. There are also uncertain or contingent liabilities in the form of losses and damages from on-site accidents or natural events with large but uncertain impacts. On-site accidents or natural events with substantial losses are not covered under the Price-Anderson Act. PFS Response Fourth Set, at 7, Admission Request No.11. PFS believes that the possibility of such a serious accident (e.g., from a cruise missile or military aircraft crashing into the storage casks with catastrophic release of radioactivity) is impossible or irrelevant. PFS has therefore not accounted for this possibility in its planning. PFS Response Fourth Set, at 9-11, Interrogatory No. 3. The two commitments by PFS include no commitment to any value of insurance.
- o. Whether PFS would be able to cover the losses to the public from an accident with large off-site damages would depend in part on whether the Service Agreements made PFS customers liable for these damages and if so, the number of customers involved. PFS has refused to provide the State with the form of Service Agreement it will use. See, ¶ 9.f. above.

### **PFS's Financial Base**

10. PFS has no independent assets. The large construction and operating expenses involved in this project, along with the large unknowns and the critical nature of the functions sought to be performed in the context of public health and safety, make it imperative that PFS have substantial reserves, so that when problems do occur the resources are readily available and the tendency of poorly capitalized companies to cut corners on safety matters is avoided. Lack of substantial assets means an inability to confront safety problems and an

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enhanced tendency to cut corners.

11. PFS's shortage of independent assets signals that PFS is having trouble marketing its services. Binding contracts (e.g., subscription agreements and service agreements) with member and non-member customers would establish a specific cash flow which could then be reviewed to determine adequate financial assurance as contemplated by 10 C.F.R. Part 72. Binding contracts would also provide for future short term borrowing. In this case, the lack of substantial assets is a warning bell that there is no future income stream upon which the ability to construct and operate safely depends.
12. Because PFS has no significant capital of its own and proposes to obtain its financial support from equity contributions and fees for services, all expenditures must be funded from the same source. Construction and operation of the proposed PFS facility will confront PFS with substantial costs and risks. PFS claims that the cost of constructing the facility will be approximately \$100 Million. LA, Rev. 1, at 1-5. However, other costs must also be considered such as procurement and fabrication of canisters at a cost of \$432 million (LA, Rev. 4, at 1-6); acquisition of casks at a cost of \$134 million (*id.*); and annual operating and maintenance costs are \$49 million for a 20 year facility or \$31 million for a 40 year facility (LA, Rev. 4, at 1-6).
13. In addition, PFS has also failed to account for uncollectible accounts. PFS denies that there will be any uncollectible accounts, based on a plan involving the monitoring of the creditworthiness of all customers on an ongoing basis. Parkyn Dec., at ¶ 25. However, owners of spent nuclear fuel ("SNF") who are in financial difficulties and unable to continue payments to PFS, are also likely to be unable to provide adequate assurance of payment. The impact of uncollectible accounts will affect the ability to finance the operations and decommissioning of the ISFSI. Thus, uncollectible accounts must be considered in determining financial assurance.
14. PFS has also not adequately explained how the funding of the Low rail project and the intermodal transfer facility are to be financed out of the same \$94 to 100 million construction estimate without a good deal of debt financing. Since PFS has no substantial assets, any debt financing would have to be secured by PFS's income stream. It is this very income stream that is at issue here and about which PFS refuses to answer discovery or produce relevant documents.

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Without access to the necessary financial information in the control of the Applicant, a financial determination cannot be made.

15. PFS has refused the State's discovery request for a copy of the Service Agreement. See, ¶ 9.f. above. PFS has also said that to date it has no executed Service Agreements. PFS Response Second Set, at 8, Document Request No. 9. This is notwithstanding the fact that PFS had intended to file Service Agreements with the NRC in September 1998. Draft PFS Board Minutes dated September 11, 1998 (marked as confidential by PFS), PFS bates no. 28929. Moreover, PFS has no commitments even from the PFS members to fund construction of the facility. PFS Response Fourth Set, at 9, Interrogatory No. 2.
16. PFS's own statements contradict the Parkyn declaration. "The [PFS] Board next considered the minimum tonnage commitment and cost per kg which would permit the project to go forward. Although the Board will shortly commence a market survey to determine the current level of market interest in the project, it appears that a minimum commitment should be 10,000 MTU at \$90/kg or an economically equivalent of tonnage and price. *It is expected that such a minimum commitment needs to be forthcoming from LLC members by the time of the September 15 [1998] submission to the NRC.*" Report of the Board Meeting by the Con. Ed. Representative, June 28, 1998 (marked by PFS as confidential, bates no. 29338 (*emphasis added*))
17. Something appears to have happened to PFS's resolve between June 1998 and September 1998. As far we know, there is currently no commitment by any member to make a Step V construction contribution, the funding source from members for construction. PFS Response Fourth Set, at 9, Interrogatory No. 2. Nor does PFS have a single signed Service Agreement. PFS Response Fourth Set, at 12, Document Request No. 3. In addition, the marketing program scheduled for June 1998 was never completed. Applicant's Objections and Proprietary [sic] Responses to State's Third Requests for Discovery, dated June 28, 1999, at 3-4, Document Request No. 1. All this is important because it shows that PFS intended to submit these materials to the NRC in 1998 and to get on with its marketing program. PFS now suggests that it is somehow premature or unreasonable 18 months later to expect it to have to provide evidence of funding commitments before the issuance of a license.
18. There is no reason at all that at least the members of PFS could not make a

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commitment to construction and operation funds *conditioned* on the issuance of a license. The members know the market, the alternatives, and the costs involved. Moreover, PFS members have projected that they will generate approximately 13,000 MTUs of spent fuel. ER, Rev. 6, at 1.2-8. PFS has advanced no plausible explanation as to how it could be that the *members themselves* will fund and make use of the facility, but at the same time those same members would be unwilling to make a conditional commitment this late in the process.

19. A lack of commitment among the members is manifested in part by the following:
  - a. The ongoing decline in the number of members from 12 down to eight and now possibly down to six with the sale or proposed sale of Clinton (Illinois Power) and GPU, Inc.'s two remaining operating plants (Oyster Creek and TMI-1). The eight members listed by Parkyn at ¶ 12, were taken from an RAI response dated September 15, 1998. The sale or proposed sale of Clinton, TMI-1, and Oyster Creek this year raise the question of whether Illinois Power and GPU, Inc. still continue to be members of PFS.
  - b. Attempts by the State to develop the facts underlying this steady erosion in the number of members and the unwillingness of members to make construction funding commitments have been uniformly met with outright refusals to respond. PFS Response Fourth Set, at 3-6, Admission Requests Nos. 3-8, and at 12-14, 16, Document Requests Nos. 5-8, 13.
  - c. It must be seen as inauspicious, or at least inconsistent, that even the member partners in this venture are unwilling to set an example to potential customers by signing Service Agreements, even Service Agreements explicitly conditioned on license issuance. Yet, according to PFS, not one has signed. *See*, ¶ 17 above.
20. PFS suggests that if a customer with SNF stored at PFS were to default on its on-going payment obligations, PFS could simply ship the SNF back to the customer. There is no reason at all to *assume* that customers who have shipped their SNF to PFS will have maintained their spent fuel pools and Part 50

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licenses or have a backup ISFSI. In fact, the justification for the centralized PFS storage facility is that much of PFS's potential market is from customers who would utilize PFS in order to avoid having to maintain their own facilities. *See, e.g.,* PFS Response Second Set, at 2, Admission Request No. 2. Whether defaulting customers in financial difficulty are likely to have their own Part 50 or Part 72 facilities to take the SNF back, and whether the NRC would permit them to take it back given their poor financial condition, are left unresolved.

21. PFS has no substantial assets of its own and cannot meet the 10 C.F.R. § 72.22(e) requirements based on its own current assets. PFS concedes this point. PFS Response Fourth Set, at 2, Admission Request No. 1. Therefore, if the 10 C.F.R. § 72.22(e) requirements are to be met, this must be done by demonstrating an adequate income stream from Service Agreements. PFS currently has zero signed Service Agreements. *See, ¶ 17 above.* PFS has no customers; PFS has no committed income stream. PFS's efforts to create and document an income stream from customers are cloaked in uncertainty due to PFS' refusal to respond to discovery. 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, then PFS cannot meet the requirements of 10 C.F.R. § 72.22(e).
22. In ¶ 21 of his declaration, Parkyn cites the NRC's rulemaking on insurance requirements for permanently shutdown reactors in claiming that the NRC views the need for property insurance for ISFSIs to be no more than \$25 million and the same amount for liability insurance. The NRC's rulemaking, however, offers no support for the Parkyn declaration. Moreover, the Parkyn declaration is internally inconsistent with respect to insurance. Consider the following:
  - a. Under the terms of the proposed rule, insurance may be reduced for reactors under the reactor licensing rules once the radioactivity licensed under those rules is moved to a facility licensed under another rule, *e.g.* Part 72. Under the proposed rule, the levels of insurance required under Part 50 for the reactor license can be reduced when the spent nuclear fuel at the reactor is moved to an on- or off-site ISFSI separately licensed.
  - b. In the proposed rule, the NRC is explicitly not making any determination about ISFSIs: "[t]he proposed rule does not address the

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financial protection requirement for Independent Spent Fuel Storage Installations (ISFSIs). This subject 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." 62 FR 58690, 58691 (1997).

- c. None of the reactor specific ISFSIs are likely to hold anything close to the 40,000 MTU of spent fuel applied for by PFS in this license application. Even if the language in the proposed rulemaking were otherwise informative relative to reactor-specific ISFSIs, it would not provide an authoritative statement with respect to a major centralized ISFSI designed to hold roughly half of the nation's projected commercial SNF.
- d. The Parkyn declaration at paragraphs 20 and 21 is inconsistent. In ¶ 21 Parkyn makes the following assertion: "Because PFS will maintain insurance coverage for PFSF, which will meet or exceed any requirements that the NRC may require for ISFSIs, the remote potential for an accident at the PFSF does not undermine the financial assurance that PFS provides through its funding commitments."

Yet in ¶ 20 Parkyn concedes that the NRC requires no insurance coverage at all for Part 72 facilities. Therefore any claim that PFS will maintain insurance in excess of NRC requirements means nothing at all.

- 23. Finally, the level of insurance coverage sufficient to protect the public from uncompensated losses arising out of major on-site accidents or natural events with substantial off-site losses, is an unresolved question in this proceeding. In addition, the Staff has not yet taken a position on Utah Contention K, which involves the risks associated with the bombing range adjacent to the PFS facility, the use of military airspace over the PFS facility, and with military aircraft and military munitions training on the bombing range.

DATED this December 27, 1999.

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Michael F. Sheehan, Ph.D.

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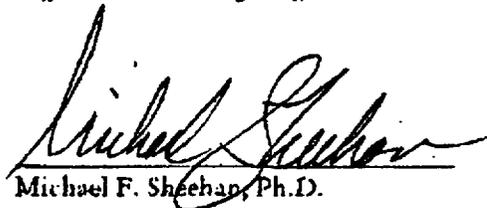
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