

RAS 2160

DOCKETED
38779

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'00 SEP -8 9:12:00

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE
PUBLIC
AFFAIRS

In the Matter of:)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	August 28, 2000

**STATE OF UTAH'S DISCUSSION OF THE IMPACT OF CLI-00-13
ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
RELATING TO CONTENTIONS UTAH E / CONFEDERATED TRIBES F
AND UTAH S [*Non-proprietary version*]**

Pursuant to the Board's Order of August 4, 2000, the State submits its view of the impact of the Commission's decision in CLI-00-13¹ on matters that currently are the subject of the parties' July 31, 2000 proposed findings of fact and conclusions of law relating to contentions Utah E/Confederated Tribes F, Financial Assurance, and Utah S, Decommissioning.

As discussed below, the main impact of the Commission's decision is that promises made by PFS must be formulated into license conditions and, furthermore, PFS cannot rely on what its proposed service agreement with customers may contain; rather PFS must submit the service agreement containing the appropriate provisions to the Board and the parties.

A. The Commission's Decision, CLI-00-13

¹ Private Fuel Storage, LLC (Independent Spent Fuel Storage Facility), CLI-00-13, 51 NRC ___ (2000).

Template = SECY-057

SECY-02

In its Order LBP-00-6,² dismissing bases 1-5 and 7-10 (except on-site property insurance) of Contention Utah E, the Licensing Board referred its decision to the Commission for interlocutory review. The Commission accepted review of the novel issue of how to extend the Part 70 Claiborne³ “license conditions” approach to Part 72 ISFSI licenses. CLI-00-13 at 6. The Commission affirmed that outside the reactor context it will not hold license applicants “to Part 50-style specific means of showing financial capability.” Id. at 9. Instead, license conditions and other commitments may be adequate mechanisms to demonstrate reasonable assurance. Id. at 8, 10. The Commission warned, however, it would not grant a license “to an applicant of dubious financial qualifications.” Id. at 9.

The Commission affirmed the Board’s decision in LBP-00-6 insofar as it approves use of license conditions as part of PFS’s financial assurance demonstration but the Commission required that the license condition proposed by the Staff, relating to the operation and maintenance of the ISFSI, cover the entire term of the license.

The Commission also held that where PFS relied on promises made during the licensing process and in support of its motion for summary disposition, those promises must be expressly incorporated into PFS’s license as license conditions. CLI-00-13 at 11, 16. Furthermore, the Commission insisted that license conditions be precisely drawn so that the Staff’s post-hearing verification of compliance becomes largely ministerial and does not

² Private Fuel Storage, LLC (Independent Spent Fuel Storage Facility), LBP-00-6, 51 NRC 101 (2000).

³ See Louisiana Energy Services, LP (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997).

require Staff having to make overly complex judgments. *Id.* at 13-14.

Finally, the Commission addressed the applicant's "abstract promises ... that it will obtain contracts and other financial commitments guaranteeing the necessary funds." CLI-00-13 at 13. The Commission held,

The Board's finding of reasonable financial assurance rested largely on PFS's promises not to commence operations prior to obtaining service contracts that included certain provisions designed to ensure that PFS's customers and members could not easily avoid payments while leaving their spent fuel on PFS's hands. Because the Board's finding turned on the inclusion of certain provisions in the contracts, the wording of the contracts is crucial. But no sample or model service agreements appear in the record, and we are in no position to determine whether the NRC staff verification role will be relatively straightforward -- a simple determination whether promised provisions appear in the contracts -- or will require difficult discretionary judgments.

CLI-00-13 at 14. Thus, to the extent that PFS relies on contractual provisions to show it has reasonable assurance of obtaining necessary funds to construct and operate the ISFSI, it must disclose the wording of the contract. *Id.* at 15.

In sum, under CLI-00-13, commitments made by PFS to show financial assurance must be turned into license conditions and PFS is required to submit to the Board and the parties a sample or model service agreement that meets all the financial assurance license conditions that stem from PFS's contractual arrangements.

B. Board's Summary Disposition Decision in Light of CLI-00-13

The Commission in CLI-00-13 endorsed the Board's summary disposition on Contention E "insofar as it approves use of license conditions" as part of PFS's financial assurance showing. *Id.* at 10. The Commission, however, did not specifically endorse the Board's reading of Claiborne as described in footnote 9 of the Board's decision.

The Commission in Claiborne first found “the hard construction cost estimate provided by LES is reasonable.” Claiborne, 46 NRC at 307. From that reasonableness determination the Commission concluded that “LES understands its funding commitment and has seriously considered the factors that will contribute to the expense of the project it is undertaking.” Id. The Board in its summary disposition decision reverses the process, and as argued by PFS and the Staff in their findings,^{4, 5} appears to set a standard that only when “construction or other costs are significantly beyond PFS estimates” will the Board find fault with PFS’s reasonable assurance demonstration. LBP-00-6 at fn. 9. Furthermore, the Board will allow PFS to overcome its faulty demonstration by making a showing that PFS understands the scope of project expenses and its funding commitment.⁶ Id.

The Commission’s decision is silent on this aspect of the Board’s decision. Instead, the Commission focused on the following aspect of Claiborne:

The Commission will accept financial assurances based on plausible assumptions and forecasts, even though the possibility is not insignificant that things will turn out less favorably than expected. Thus, the mere casting of doubt on some aspects of proposed funding plans is not by itself sufficient to defeat a finding of reasonable assurance.

CLI-00-13 at 9-10, *quoting* North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 210, 222 (1999). Thus, under CLI-00-13, the Applicant must present

⁴ In this discussion, the State refers to the “Applicant’s Proposed Findings of Fact And Conclusions of Law on Contentions Utah E/Confederated Tribes F and Utah S [*Proprietary Version*]” (July 31, 2000); and “NRC Staff’s Proposed Findings of Fact and Conclusions of Law Concerning Contention Utah E/Confederated Tribes F (Financial Qualifications)” (proprietary) (July 31, 2000).

⁵ See PFS Findings ¶ 3 and 41; Staff Findings ¶¶ 2.49 and fn 9, and 2.56.

⁶ See Staff Findings ¶¶ 2.58 and 2.187.

“plausible assumptions and forecasts” and that a party challenging the Applicant’s qualifications needs to do more than cast doubt on some aspects of PFS’s proposed funding plan. This same standard should also apply to PFS’s cost estimates. Rather than requiring the State to prove that cost estimates are significantly beyond those proposed by the Applicant, the appropriate standard is to require the State to do more than cast doubt on some aspect of PFS’s costs estimate.

To take the position the Staff and PFS ascribe to the Board’s decision in their findings would seriously jeopardize the Commission’s warning that it will not “grant a license to an applicant of dubious financial qualifications.” CLI-00-13 at 9. The mere fact that an Applicant may understand the scope of project expenses does nothing to overcome the potential for granting a license to an Applicant of dubious financial qualification. The Atlas mill tailings bankruptcy case in Utah is an excellent illustration of this point. See State of Utah’s Response to the Applicant’s Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes F (December 27, 1999) at 9-11, and Attachment B thereto, Declaration of William J. Sinclair (December 27, 1999).

The parties’ findings arguing for the standard articulated in the Board’s summary disposition decision must, therefore, be viewed in light of CLI-00-13. The State respectfully requests that the Board reject the Staff’s and the PFS’s findings that rely on the “construction or other costs significantly beyond PFS estimates” as the applicable standard. Given the posture of this proceeding where the State is prohibited from litigating PFS’s financial wherewithal up-front prior to license issuance, to set such a standard offers no protection against a company with no assets from going forward with a project to store most

of the nation's commercial spent nuclear fuel. Moreover, a few million here and a few million there soon adds up to significant costs, especially if they are incurred in a year when PFS's financial condition has no cushion to absorb those costs.

C. Impact of CLI-00-13 to the Parties Findings and Conclusions

1. To Avoid Ambiguity and Unenforceability, PFS's Promises Must be Formulated as License Conditions.

In CLI-00-13, the Commission was unwilling to rely upon abstract promises made by PFS during the adjudication and licensing process. The Commission voiced a concern that such abstract promises may lead to ambiguity and create problems with NRC's ability to enforce those promises unless they were reduced to specific license conditions. CLI-00-13 at 11. The same concerns exist with the promises PFS and the Staff relied upon in the presentation of their cases at the evidentiary hearing and in the findings and conclusions they filed on July 31 for Contentions Utah E and S.

In its Findings and Response Findings, the State references where license conditions must ensue to meet CLI-00-13. For example, in its Response Findings for Contention S, ¶ 4, the State offers specific wording for formulating into a license condition PFS's statement that it will annually review its decommissioning costs estimates. In addition, in the State's initial Findings for Contention S, ¶ 7, the State describes a license condition with respect to insurance coverage for large scale accidents.

With respect to Contention Utah E, the State Response Findings⁷ requests the

⁷ See State of Utah's Proposed Response to Findings of Fact and Conclusions of Law Relating to Contention Utah E/Confederated Tribes F (August 28, 2000).

following PFS promises be written as license conditions: construction start date (Response Findings ¶ 4); phases of construction (Id. ¶ 6); rail option (Id. ¶ 8); commitment not to shift costs (Id. ¶ 11); inclusion of administrative and operating costs (Id. ¶ 13); and O&M funding for additional phases of storage capacity (Id. ¶ 17).

To the extent that this proceeding has been bifurcated into hearings on costs estimates and post-hearing license conditions to demonstrate PFS's financial assurance qualification, all promises made by PFS in this proceedings stating how it is financially qualified to construct, operate and decommission the ISFSI must be formulated as license conditions.

2. A Service Agreement Must be Provided Showing the Wording of Pass-Through Provisions

A significant portion of PFS's costs to construct and operate the ISFSI is labeled by PFS as pass-through costs. [REDACTED TEXT]. The Board cannot rely on abstract notions of what may be contained in the proposed PFS customer service agreement; specific contract conditions must form part of the record in this proceeding. CLI-00-13 at 13. Whether PFS's proposed service agreement passes muster must await production of the document by PFS on or before September 29, 2000. *Sae* Board's Order of August 16, 2000.

3. Even if PFS Provides the Parties with a Service Agreement, Pass-through Costs must Be Designated as Costs in this Proceeding.

The PFS customer service agreements affects revenue side of the financial assurance equation. Regardless of whether PFS can pass through costs, the Staff still needs to know the estimates costs of construction, O&M and decommissioning if it is to avoid making overly complex judgments. By failing to describe costs or potential costs increases, PFS cost

estimates will not allow the Staff to perform a ministerial review action in determining with PFS satisfies LC 17-1 and 17-2, and other license conditions. Accordingly, PFS must delineate all pass-through costs as "costs" and not merely rely on generalized statements that certain costs will be passed through to PFS customers.

D. Conclusion

The Commission in CLI-00-13 offered direction in the use of post-hearing license conditions to satisfy, in part, a demonstration of financial assurance. Accordingly, PFS's promises must be formulated as license conditions; PFS must produce provisions from its proposed customer service agreement that show the terms and conditions of passing through costs to its customers; and finally, pass-through costs cannot be deferred solely to revenue but must be adequately delineated as costs.

DATED this 28th day of August, 2000.

Respectfully submitted,



Denise Chancellor, Assistant Attorney General
Fred G Nelson, Assistant Attorney General
Connie Nakahara, Special Assistant Attorney General
Diane Curran, Special Assistant Attorney General
Laura Lockhart, Assistant Attorney General
Attorneys for State of Utah
Utah Attorney General's Office
160 East 300 South, 5th Floor, P.O. Box 140873
Salt Lake City, UT 84114-0873
Telephone: (801) 366-0286, Fax: (801) 366-0292

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S DISCUSSION OF THE IMPACT OF CLI-00-13 ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO CONTENTIONS UTAH E/CONFEDERATED TRIBES F AND UTAH S [*Non-proprietary version*] was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class only to those indicated with an asterisk, this 28th day of August, 2000:

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

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

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: jrk2@nrc.gov
E-Mail: kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: psl@nrc.gov

Sherwin E. Turk, Esq.
Catherine L. Marco, Esq.
Office of the General Counsel
Mail Stop - 0-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: set@nrc.gov
E-Mail: clm@nrc.gov
E-Mail: pfscase@nrc.gov

Jay E. Silberg, Esq.
Ernest L. Blake, Jr., Esq.
Paul A. Gaukler, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N. W.
Washington, DC 20037-8007
E-Mail: Jay_Silberg@shawpittman.com
E-Mail: ernest_blake@shawpittman.com
E-Mail: paul_gaukler@shawpittman.com

John Paul Kennedy, Sr., Esq.*
1385 Yale Avenue
Salt Lake City, Utah 84105
E-Mail: john@kennedys.org

Joro Walker, Esq.*
Land and Water Fund of the Rockies
2056 East 3300 South Street, Suite 1
Salt Lake City, Utah 84109
E-Mail: joro61@inconnect.com

Danny Quintana, Esq.*
Danny Quintana & Associates, P.C.
68 South Main Street, Suite 600
Salt Lake City, Utah 84101
E-Mail: quintana@xmission.com

James M. Cutchin
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-Mail: jmc3@nrc.gov
(*electronic copy only*)

Office of the Commission Appellate
Adjudication
Mail Stop: O14-G-15
U. S. Nuclear Regulatory Commission
Washington, DC 20555

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

Denise Chancellor
Assistant Attorney General
State of Utah