

RAS 2175

September 11, 2000
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
PRIVATE FUEL STORAGE, L.L.C.)	Docket No. 72-22-ISFSI
)	
(Independent Spent)	
Fuel Storage Installation))	

NRC STAFF'S RESPONSE TO THE STATE OF UTAH'S
COMMENTS CONCERNING THE IMPACTS OF CLI-00-13

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's "Order (Granting Motion for Leave to File Reply and Permitting Additional Filings on Impact of CLI-00-13)," the staff of the Nuclear Regulatory Commission (Staff) hereby submits its response regarding the impacts of the Commission's decision in CLI-00-13, 52 NRC ____ (Aug. 1, 2000).

BACKGROUND

On March 10, 2000, the Atomic Safety and Licensing Board (Board) issued a Memorandum and Order granting in part and denying in part the Applicant's motion for partial summary disposition of Contention Utah E/Confederated Tribes F (Financial Assurance). See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-6, 51 NRC 101 (2000). In its decision, the Board ruled, among other things, that the Applicant could rely on license conditions to demonstrate financial assurance for the construction and operation of its proposed facility. That ruling eliminated most of the issues in the contention, leaving only certain matters (the adequacy of the

Applicant's construction and operating cost estimates, and onsite property insurance) for resolution through an evidentiary hearing. Pursuant to 10 C.F.R. § 2.730(f), the Board referred its ruling to the Commission. *PFS*, LBP-00-06, 51 NRC 101, 136 (2000).

An evidentiary hearing with respect to this contention was held in Salt Lake City, Utah, in June 2000. Numerous witnesses appeared on behalf of the Applicant, the State of Utah, and the Staff, who presented testimony with respect to the adequacy of the Applicant's construction and operating cost estimates and the Applicant's plans for onsite nuclear property insurance. Proposed findings of fact and conclusions of law concerning these matters were filed by the parties on July 31, 2000.¹

Thereafter, on August 1, 2000, the Commission issued its Memorandum and Order, CLI-00-13, directing, among other things, that the Staff include in PFS' license several conditions that reflect financial assurance commitments PFS has made during the course of the proceeding. See CLI-00-13, at 1. On August 4, 2000, the Board issued an "Order (Scheduling/Administrative Matters)," which, among other things, directed that the parties submit their respective views regarding the impact, if any, of CLI-00-13 on the matters that are the subject of the parties' proposed findings of fact and conclusions of law relating to contentions Utah E/Confederated Tribes F and Utah S. On August 28, 2000, the parties

¹ See (1) "NRC Staff's Proposed Findings of Fact and Conclusions of Law Concerning Contention Utah E/Confederated Tribes F (Financial Qualifications)," dated July 31, 2000; (2) "NRC Staff's Proposed Findings of Fact and Conclusions of Law Concerning Contentions Utah R (Emergency Planning) and Utah S (Decommissioning Funding)," dated July 31, 2000; (3) "Applicant's Proposed Findings of Fact and Conclusions of Law on Contentions Utah E/Confederated Tribes F and Utah S," dated July 31, 2000; (4) "State of Utah's Proposed Findings of Fact and Conclusions of Law Regarding Contention Utah S, Private Fuel Storage, LLC's Capacity to Fund Decommissioning," dated July 31, 2000; and (5) "State of Utah's Proposed Findings of Fact and Conclusions of Law Regarding Contention Utah E," dated July 31, 2000.

submitted their reply findings of fact and conclusions of law, and discussions regarding the impact of CLI-00-13.²

In its submission, the Staff stated its view that the Commission's decision does not substantially impact the resolution of the matters that are currently the subject of the parties' proposed findings of fact and conclusions of law. See Staff's Discussion at 39-40. The Staff further noted that although it had previously stated that some of the commitments made by the Applicant were not required to be license conditions, in light of CLI-00-13, the Staff will include the items set forth by the Commission as license conditions. *Id.* at 40.

In its Discussion, the State asserted, among other things, that all of the Applicant's commitments made to demonstrate it is financially qualified to construct, operate, and decommission the proposed facility must be stated as license conditions. See State's Discussion at 7. The State additionally referred to statements made by the Commission that the State contends should be used as the standard for determining the adequacy of the Applicant's cost estimates. *Id.* at 3-6.

The Applicant, for its part, asserted that the Commission's ruling that the Applicant must provide a sample Service Agreement that meets the financial assurance license conditions renders moot the State's view that reliance cannot be placed on provisions in the customer Service Agreement. See Applicant's Discussion at 3. The Applicant asserted

² See (1) "NRC Staff's Proposed Findings in Reply to the State of Utah's Proposed Findings Concerning Contentions Utah S and Utah E/confederated Tribes F" (Staff's Discussion), dated August 28, 2000, at 39-41; (2) "Applicant's Reply to the Proposed Findings of Fact and Conclusions of Law of the State of Utah and the NRC Staff on Contentions Utah E/Confederated Tribes F, Utah R, and Utah S" (Applicant's Discussion), dated August 28, 2000, at 3-4; and (3) "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" (State's Discussion), dated August 28, 2000.

that the only other effect of CLI-00-13 is to eliminate arguments made by the State that the Board should discount specific commitments made by PFS regarding provisions to be included in the Service Agreements. *Id.*

For the reasons set forth below, the Staff submits that the State's reading of CLI-00-13 is overly broad and that only those matters specifically addressed in the Commission's decision should be incorporated in license conditions. Further, the State is incorrect in asserting that CLI-00-13 establishes a new standard for the acceptability of PFS' cost estimates.³

DISCUSSION

A. The Impact of CLI-00-13 on the Parties' Proposed Findings

In its Discussion, the State identified numerous statements made by PFS during the proceeding that the State contends should be included as license conditions. These include: PFS's statement that it will annually review its decommissioning cost estimates; PFS's anticipated construction start date; phases of construction; rail option; commitment not to shift costs; inclusion of administrative and operating costs; and O&M funding for additional phases of storage capacity. *Id.* at 7. In addition, the State refers to its initial proposed findings of fact wherein it framed a license condition with respect to insurance coverage for large-scale accidents. *Id.* The Staff considers that the State's reading of the Commission's Order in CLI-00-13 is overly broad and incorrect.

³ The Applicant's discussion is in general agreement with that of the Staff, and, therefore, the Staff's response addresses only the matters raised by the State in its discussion.

In its Order, the Commission directed the Staff to include in the Applicant's license "several conditions that reflect financial assurance commitments PFS has made in the course of this proceeding." CLI-00-13, slip op. at 1. The Commission noted that in addition to the two license conditions proposed by the Staff, the Board, in LBP-00-06, had relied on five other commitments made by PFS during the licensing process, which were specifically identified in the Commission's Order. *See id.* at 4. In its discussion of the inclusion of additional license conditions, the Commission again set forth this same set of license conditions. *Id.* at 10 & n.2. The Commission stated that "Utah argues that these additional commitments amount to bald promises . . ." *Id.* at 10 (emphasis added). The Commission further stated, "[w]hile we disagree with Utah's suggestion . . . we hold here . . . that the additional conditions should be expressly incorporated into the PFS license in order to . . . eliminate any question about whether these promises are fully enforceable." *Id.* at 10-11.

Further, however, the Commission directed the Staff to "include in PFS's license, as license conditions, promises made by PFS during the licensing process and in support of its motion for summary judgment, including its commitments" in the seven specified areas, which had been addressed previously in the body of its decision. *Id.* at 16 (emphasis added). The State appears to believe that the use of the term "including" in this sentence indicates the Commission's intent to require that all of PFS's commitments or statements of intent to take some future action must be reduced to license conditions, no matter how trivial or insignificant those statements may have been. *See State's Discussion* at 2, 3, 7. The Staff considers the State's expansive interpretation of the Commission's decision to be without merit.

The Commission's decision must be read in its entirety. It is the Staff's understanding, based on the context of the Commission's entire decision, that only the seven specific items listed by the Commission are to be imposed as license conditions, and that the Commission did not intend to require that each and every other statement of intent or commitment made by PFS, not addressed in its decision, are required to be "included" as license conditions. See CLI-00-13, slip op. at 4, 10 n. 2, 16. Surely if the Commission had intended to require any other commitments to be included as license conditions, it would have identified those matters just as it identified the specific seven matters set forth in its decision.

Moreover, under the State's interpretation of CLI-00-13, any statement of intent by PFS regarding a future act arguably could necessitate a license condition. This is inconsistent with established NRC practice, whereby only significant matters require a license condition. For example, excessive requirements could lead to a decrease of effectiveness; operating licenses should not contain matters that are not of "immediate importance to the safe operation of the facility." See *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 423, 424 (1980) (applicant's commitment incorporated in the Appeal Board's Order); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-898, 28 NRC 36, 41 n.20 (1988) (commitment was not required to be incorporated in a license condition or Board Order).

To the extent that there is any question regarding the intent of the Commission in this regard, the Staff recommends that the Board refer its ruling to the Commission,

pursuant to the Board's powers set forth in 10 C.F.R. § 2.730.⁴ See *PFS*, LBP-00-06, 51 NRC 101, 136 (2000).

B. The Proper Standard to Apply

In its Discussion, the State additionally requests that the Board reject the Staff's and PFS's findings that rely on the financial assurance standard set forth by the Board in LBP-00-06. State Discussion at 5. There, the Board opined that "in the face of a record establishing that construction or other costs are significantly beyond PFS estimates, a final determination of PFS compliance with the reasonable assurance requirement of section 72.22(a) could be problematic without some additional showing by PFS regarding its understanding of the scope of project expenses and its funding commitment." *PFS*, LBP-00-06, 51 NRC 101, 123 n.9.

The State recognizes that the Commission, in CLI-00-13, was silent with respect to the standard by which the cost estimates developed by PFS are to be judged -- but the State, nonetheless, appears to argue that the Commission established a less stringent standard than the Board's. *Id.* at 4. In this regard, the State relies upon the following statement in CLI-00-13:

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.

⁴ The Commission encourages the licensing boards to refer rulings or certify questions that involve novel issues that could benefit from early resolution. *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998).

CLI-00-13, slip op. at 9-10, *quoting North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-06, 49 NRC 201, 222 (1999) (emphasis added).

The State's attempt to challenge the standard required for a showing of reasonable assurance that an applicant is financially qualified to construct and operate its facility is without merit, and should be rejected for the following reasons.

First, the State's argument is, in reality, an untimely motion for reconsideration of the standard identified in LBP-00-06, issued six months ago, without any showing of good cause for its untimeliness. *See PFS*, LBP-00-06, 51 NRC 101. Second, the Commission, in CLI-00-13, did not address the standard to be applied, inasmuch as this issue was not before the Commission, and, therefore, the Commission did not alter it. Thus, the standard enunciated by the Board continues to be valid. Third, and most significantly, the Commission's statement quoted by the State does not establish a standard that is any different from the standard articulated by the Board. The Commission's decision indicates that even if "the possibility is not insignificant" that an applicant's cost estimate is incorrect, as long as it is based on assumptions and forecasts that are "plausible," the applicant's financial assurance will be acceptable. This may be compared to the standard articulated by the Board that only "in the face of a record establishing that construction or other costs are significantly beyond PFS estimates" will the Board seek further assurances from the applicant in order to demonstrate financial assurance. *PFS*, LBP-00-06, 51 NRC 101, 123 n.9 (emphasis added). In sum, both the Commission and the Board have indicated that uncertainty is acceptable in an applicant's cost estimates, and the Commission's

decision does nothing to alter the standard that is to be applied in determining an applicant's financial qualifications.

For these reasons, the Board should continue to apply the standard in LBP-00-06.

CONCLUSION

For the reasons set forth above, the Board should reject the State's assertion that all of PFS's statements of intent and commitments related to financial assurance must be incorporated as license conditions. To the extent that there is any question regarding the intent of the Commission, the Board should refer its ruling to the Commission. Further, the Board should reject the State's assertion that CLI-00-13 established a standard different from that enunciated by the Board.

Respectfully submitted,

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Dated at Rockville, Maryland
this 11th day of September, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO THE STATE OF UTAH'S COMMENTS CONCERNING THE IMPACTS OF CLI-00-13" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 11th day of September, 2000:

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