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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATION STAFF

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22
)	
(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

**APPLICANT'S RESPONSE TO STATE OF UTAH'S AND NRC STAFF'S FILINGS
REGARDING THE IMPACT OF COMMISSION DECISION CLI-00-13**

Pursuant to the Order of the Atomic Safety and Licensing Board ("Board") of September 1, 2000,¹ Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby responds to the State of Utah's ("State") and the NRC Staff's ("Staff") filings² regarding the impact of the Commission's decision in CLI-00-13, 52 NRC __ (Aug. 1, 2000)³ on the matters that "are the subject of the parties' July 31, 2000 proposed findings of fact and conclusions of law relating to the issues considered in the Board's June 2000 evidentiary hearing sessions" (including "the State's suggestions regarding the adoption of additional license conditions").⁴

¹ Order (Granting Motion for Leave to File Reply and Permitting Additional Filings on Impact of CLI-00-13) (Sept. 1, 2000) ("Board Sept. 1 Order").

² 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 (Aug. 28, 2000) ("State Brief on CLI-00-13"); see 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 (Aug. 28, 2000) ("NRC Staff Reply Findings"); see also State of Utah's Proposed Response Findings of Fact and Conclusions of Law Relating to Contention Utah R (August 28, 2000) ("State Utah R Response").

³ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC __ (Aug. 1, 2000).

⁴ Board Sept. 1 Order. The State relies on CLI-00-13 as authority for imposing license conditions concerning Utah R. See State Utah R Response at 5-6. Accordingly, PFS addresses the potential impact of CLI-00-13 with respect to Utah R, as well.

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I. BACKGROUND

In CLI-00-13, the Commission affirmed the use of license conditions to support a finding of financial assurance under 10 C.F.R. Part 72. CLI-00-13, slip op. at 15. The Commission did require, however, that certain additional financial assurance commitments made by PFS (beyond those included in license conditions proposed by the Staff) were to be expressly incorporated into the PFS license. Id. at 16. The Commission further required PFS “to produce a sample [S]ervice [Agreement] that meets all financial assurance license conditions” and provided that the State be allowed “an opportunity to address the adequacy of the [sample][S]ervice [Agreement] to meet the concerns raised in Contention E.” Id. at 15.

As set forth in PFS’s proposed reply findings for Utah E, the impact of CLI-00-13 on the financial assurance issues considered in the June 2000 evidentiary hearing sessions is minimal.⁵ The only effect of CLI-00-13 is to render not ripe for decision arguments made by the State in its findings that the Board should discount commitments made by PFS at the hearing regarding provisions that will be included in the Service Agreements. Rather, under CLI-00-13, the sufficiency of the Service Agreements to implement such commitments made by PFS is to be the subject of the upcoming review of the sample Service Agreement that PFS is to submit. In all other respects, the issues raised by the parties in their proposed findings are ripe for decision.⁶ The NRC Staff similarly concludes that CLI-00-13 “does not substantially impact” the resolution of the matters considered in the June 2000 evidentiary hearing.⁷

⁵ 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 at 3-4 (August 28, 2000) (“PFS Reply Findings”).

⁶ Id.

⁷ NRC Staff Reply Findings at 39-40. As stated by the Staff, “the provision of the sample Service Agreement by PFS will provide additional grounds to rely on the commitments by PFS to include various matters in the Service Agreements.” Id. at 40.

In broad terms, the State agrees with PFS and the Staff that, under CLI-00-13, “commitments made by PFS to show financial assurance must be turned into license conditions” and that “PFS is required to submit to the Board and the parties a sample or model [S]ervice [A]greement that meets all the financial assurance license conditions. . . .” State Brief on CLI-00-13 at 4. The State, however, claims – incorrectly – that CLI-00-13 requires a different legal standard for determining the sufficiency of PFS’s cost estimates than that opined by the Board in its decision on partial summary disposition of Utah E and relied upon by the Staff and PFS in their proposed findings. The State also seeks to stretch the Commission’s directive to include PFS’s financial assurance commitments into license conditions far beyond that mandated by CLI-00-13. These issues are discussed in turn below.

II. ARGUMENT

A. Impact of CLI-00-13 on the Proper Legal Standard

The State claims that, although 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,’ it “did not specifically endorse the Board’s reading of Clairborne⁸ as described in footnote 9 of the Board’s decision.”⁹ The State argues that footnote 9 of the Board’s decision improperly sets 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” and improperly would “allow PFS to overcome its faulty demonstration by making a showing that PFS understands the scope of project expenses and its

⁸ Louisiana Energy Services, L.P. (Clairborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997).

⁹ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-6, 51 NRC 101, 123 n.9, aff’d in part, rev’d in part and remanded, CLI-00-13, 52 NRC __ (Aug. 1, 2000).

funding commitment.” State Brief on CLI-00-13 at 5. The State claims that PFS and the NRC Staff similarly apply an improper standard in their proposed findings. Id.

The State’s argument on this point is much ado about nothing.¹⁰ Footnote 9 of the Board’s decision on summary disposition on Utah E provides in full as follows:

In its Claiborne decision, the Commission noted that, relative to the issue of whether financial difficulties might lead to construction safety problems, in addition to the applicant’s advance funding commitment, the Commission’s reasonable assurance finding was based on the applicant’s construction cost estimate, which had been established as “reasonable.” CLI-97-15, 46 NRC at 307. According to the Commission, the solidness of the applicant’s cost estimate indicated it understood its funding commitment, had seriously considered the factors that would contribute to project expenses, and was in a position to recognize promptly any unforeseen cost escalation difficulties, thereby allowing it time to maintain its financial qualifications. See id. Recognizing that the “reasonableness” of the PFS cost estimate is still at issue relative to subpart six of this contention, this nonetheless does not preclude us from granting summary disposition relative to this and other portions of contention Utah E/Confederated Tribes F. Rather, it serves to emphasize the importance of the cost issue. Consistent with Claiborne, 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.

LBP-00-6, 51 NRC at 123 (emphasis added).

Thus, the standard enunciated by the Board for determining the legal sufficiency of PFS’s cost estimates is one of “reasonableness,” the same standard as that set forth by PFS and the Staff

¹⁰ Although the State argues that the Commission did not specifically endorse the Board’s reading of Claiborne in footnote 9, more significant is the fact is that the Commission did not find anything to criticize or provide contrary guidance with respect to footnote 9. In this regard, the Commission has in the past seen fit to provide guidance on specific issues where it is concerned that the licensing proceeding may be going astray. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 35-37 (1998).

in their proposed findings.¹¹ The reasonableness standard is, as reflected in footnote 9 above, enunciated by the Commission in its Clairborne decision and is further reaffirmed in CLI-00-13 (slip op. at 7, 9-10). Contrary to the State's criticisms, the Board's statement in the last sentence of footnote 9, that a "record establishing that . . . costs are significantly beyond PFS estimates . . . could be problematic" in establishing compliance with 10 C.F.R. 72.22 (without some additional showing by PFS), is not a misstatement of the reasonableness standard. Rather, it is an appropriate reflection that absolute precision and certainty is not required of cost estimates under 10 C.F.R. 72.22. See Clairborne, CLI-97-15, 46 NRC at 307; CLI-00-13, slip op. at 9-10. Any lack of precision or certainty must be material. See PFS Reply Findings at 8-9. As stated by Judge Lam at the hearing, for any such lack of precision or certainty to be material, "it has to be . . . of such magnitude it would ultimately impact on reasonable assurance." Tr. at 1719.¹²

Thus, the concerns expressed by the State in its Brief on the impacts of CLI-00-13 on the applicable legal standard (pages 4-7) are without merit.

B. The Formulation of Additional License Conditions

Based on the authority of CLI-00-13, the State has proposed license conditions (both in its Brief on the impact of CLI-00-13 and in its Response Findings) for each of the three contentions that were the subject of the June evidentiary hearings. However, the license conditions that the State seeks to impose go far beyond the mandate of CLI-00-13 and are

¹¹ See Applicant's Proposed Findings of Fact and Conclusions of Law on Contentions Utah E/Confederated Tribes F and Utah S (July 31, 2000) ("PFS Finding") ¶¶ 3, 47, 49, 90; NRC Staff Proposed Findings of Fact and Conclusions of Law concerning Contentions Utah E/Confederated Tribes F (Financial Qualifications (July 31, 2000)) ¶ 2.55 to 2.58.

¹² Similarly, the State's concern regarding the Board's reference to "some additional showing by PFS regarding its understanding of the scope of project expenses and its funding commitment" when "costs are significantly beyond PFS estimates" is likewise misplaced. It simply reflects that in such circumstances – which has not been shown to be the case here – the Board might well look to further assurances from an applicant to demonstrate financial assurance.

contrary to Commission regulation and precedent. The State seeks to impose a licensing condition for every commitment and stated intention made by PFS in the licensing process, regardless of its nature or significance. That such is not required is confirmed by newly promulgated Part 72 regulations, which provide that “applicant commitments developed during the license approval and/or hearing process” are to be submitted in the original Final Safety Analysis Report “90 days after issuance of the license.” 10 C.F.R. § 72.70(a); see also Philadelphia Electric Co. (Limeriek Generating Station, Units 1 and 2), ALAB-857, 25 NRC 7, 13-14 (1987).

The license conditions that the States seeks to impose (based on the authority of CLI-00-13) with respect to each of the three contentions heard during the June 2000 evidentiary hearings, Utah E, R and S, are addressed in turn below.

1. Proposed License Conditions Related to Contention Utah E

In CLI-00-13, the Commission required some of PFS’s financial commitments to be codified as license conditions “to eliminate any ambiguity as to what PFS’s commitments are and to eliminate any question about whether these promises are fully enforceable.” CLI-00-13, slip op. at 11.¹³ PFS had made these financial commitments in the course of the licensing process, primarily when it filed its motion for summary disposition of Utah E. Id.; see LBP-00-6, 51 NRC at 137-38. In its Brief on CLI-00-13 (at page 8), the State summarizes a host of additional conditions that it claims should be imposed concerning Utah E. The additional conditions that the State seeks to impose are, however, for the most parts tangential to, and unnecessary to assure, PFS financial assurance.

¹³ The Commission rejected the State’s suggestion, however, that PFS’s commitments were not enforceable unless they were codified as license conditions. Id.

For example, the State seeks a license condition “stating that PFS may not commence construction until it may lawfully do so after the issuance of the ISFSI license” in order to eliminate the conflict with the construction date shown in the Environmental Report (“ER”) (of September 2000) and that stated by Mr. Parkyn in his hearing testimony.¹⁴ This proposed condition, however, does not relate to PFS’s financial assurance.¹⁵ Similarly, the claimed need to have a commitment not to shift costs is improper and unnecessary, since it presumes - without a basis - that PFS would act nefariously.¹⁶ Likewise no license condition is appropriate concerning the Low Rail Line or the ITP.¹⁷ Similarly, the other proposed conditions summarized by the State in its Brief on CLI-00-13 are improper or unnecessary,¹⁸ and except for the “inclusion of administrative and operating costs,” should not be manifested in license conditions.¹⁹

¹⁴ See State of Utah’s Proposed Response with respect to Findings of Fact and Conclusions of Law Relating to Contention Utah E/Confederated Tribes F (August 28, 2000) (“State Utah E Response”) ¶ 4.

¹⁵ Further, such a condition at the time the license were issued would be meaningless.

¹⁶ See General Public Utilities Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 164 (1996).

¹⁷ See PFS Findings ¶ 39; PFS Reply Findings at 34.

¹⁸ The State claims that a condition should be drafted to require PFS to construct the facility in the three phases in which the construction cost estimates are divided. If, however, initial service agreements supported a facility larger than the minimum size facility specified in License Condition 1, the License Condition contemplates that PFS could build such a larger facility at the outset. Alternatively, PFS could decide to build less than the additional capacities specified for Phases II and III should subsequent Service Agreements not support their specified capacities. Such would not impair the State’s right to a hearing, as the State argues, in that, the cost estimates Phase II and III could easily be adjusted based on the cost estimate information provided by PFS. See PFS Exh. D. Likewise, no such license condition with respect to O&M funding for additional phases, beyond the initial minimum sized facility, is required for the reason stated in PFS’s Reply Findings at 27-29.

¹⁹ The State argues that a license condition should be added concerning administrative and operational costs during construction because of confusion over whether such costs are covered under License Condition 1. Any such confusion is solely the State’s. PFS’s commitment from which the NRC drafted its License Condition 1 specifically stated that its commitment concerning sufficient construction funds included “PFS’s administrative and operational costs during construction.” LBP-00-06, 51 NRC at 108. Therefore, PFS has no objection to the inclusion of the original parenthetical in its commitment (“including PFS’s administration and operational costs during construction of the project”) in the first sentence of License Condition 1.

2. Proposed License Conditions Related to Contention Utah R

In its reply findings on Utah R, the State asserts that CLI-00-13 requires a number of PFS commitments regarding adherence to NFPA standards to be “codified as license conditions.”²⁰ CLI-00-13 does not require, however, PFS’s commitments regarding adherence to NFPA standards to be codified as license conditions. PFS’s commitments to adhere to NFPA standards are expressly incorporated in the PFSF Safety Analysis Report (SAR) and/or Emergency Plan (EP).²¹ Therefore, there is no question as to what PFS’s commitments are. Furthermore, there is no question that PFS’s commitments in the SAR and the EP are enforceable. The SAR and EP constitute part of the license application upon which license approval is based. 10 C.F.R. §§ 72.24, 72.32(a). The NRC has the authority under the Atomic Energy Act to regulate all aspects of a nuclear facility in order to protect public health and safety and furthermore, it expects licensees to adhere to any obligations and commitments made and will issue appropriate orders to ensure that such commitments are met. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1126 (1984); see 10 C.F.R. § 72.44(f) (emergency plan compliance is mandatory). Therefore, PFS’s SAR and EP commitments to adhere to NFPA standards do not need to be codified as license conditions.

Moreover, even if PFS’s commitments had not been expressly incorporated in the SAR and the EP, the proper action to take to ensure their clarity and enforceability would be to explicitly incorporate the commitments in the SAR or EP, not to impose them as license conditions. See 10 C.F.R. § 72.70(a)(2) and Limerick, ALAB-857, 25 NRC at 13-14. License

²⁰ State Utah R Response at 6.

²¹ See SAR at 4.3-7, 4.3-10 to -12, 4.3-16 to -17, Fig. 4.3-1 (NFPA 801); id. at 4.3-20 (NFPA 58); id. at 4.3-20 (NFPA 54) (The SAR states that “[t]he propane heating system will be installed in accordance with NFPA requirements,” which requirements are located in NFPA 54, “National Fuel Gas Code” (1999)). EP at 4-3, 4-9, 6-2 (NFPA 600); SAR at 4.3-8 to -11, 4.3-14, Fig. 4.3-1 (NFPA 16); id. at 4.3-14, Fig. 4.3-1 (NFPA 14); id. at 4.3-14 (NFPA 24); id. at 4.3-14 (NFPA 25); id. at 4.3-14, Fig. 4.3-1 (NFPA 72).

conditions are not intended to incorporate all of a licensee's SAR or EP design or other commitments. This is clear from the regulatory history of Part 50:

Prior to 1959, [AEC regulations included a nuclear reactor licensee's] entire hazards report . . . as a license condition, thereby holding the licensee to all design specifications and operating conditions described in the report. This approach was found to be impractical and burdensome on both licensees and the Commission because processing of numerous minor changes consumed extensive and unnecessary time and effort. In addition, the many details included and the extensive effort required on minor items tended to diffuse the attention that should have been focused on major safety areas.²²

The State has merely listed PFS's commitments to adhere to NFPA standards; it has not shown in any way that PFS's adherence constitutes a "major safety area." See State Response R at 5-8. Therefore, PFS's commitments need not be codified.

3. Proposed License Conditions Related to Contention Utah S

The State also proposes two license conditions with respect to Utah S, neither of which is necessary. First, the State proposes a license condition that would require PFS to update its decommissioning cost estimates on an annual basis, as committed to in both PFS's decommissioning funding plan, (which is Appendix B to PFS's License Application) and Mr. Parkyn's hearing testimony. See PFS Reply Findings at 52. Since the commitment is already part of PFS's License Application, a license condition is not necessary. Moreover, the commitment would only require what PFS is bound to do under the regulations (10 C.F.R. § 72.30(b)), and as such is not appropriate.²³

²² Proposed Amendments to 10 CFR 50: Technical Specifications; Technical Information Required of Applicants, AEC-R 2/50 (June 30, 1966) at 3.

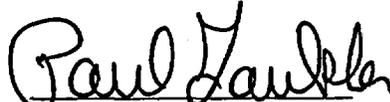
²³ See Shoreham, ALAB-788, 20 NRC at 1125-1126

Second, no condition concerning property insurance is required under Utah S, as claimed by the State, because cleanup from accidents is not required as part of NRC decommissioning.²⁴ Moreover, per the mandate of CLI-00-13, a license condition concerning the amount of property insurance that PFS is to obtain, as determined under Utah E, is to be included as a license condition.²⁵

III. CONCLUSION

For the foregoing reasons, the Applicant submits that Commission decision CLI-00-13 should have no impact beyond that which the Applicant has set forth in its proposed findings of fact and conclusions of law on Contention Utah E.

Respectfully submitted,



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Dated: September 11, 2000

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²⁴ PFS Findings ¶ 128; NRC Staff Reply Findings ¶¶ 8,11-13

²⁵ CLI-00-13, slip op. at 16.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

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CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Response to State of Utah's and NRC Staff's Filings Regarding the Impact of Commission Decision CLI-00-13 were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 11th day of September 2000.

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