

RAS 2631

January 16, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 01/17/01

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 "APPLICANT'S
MOTION TO STRIKE PORTIONS OF STATE OF
UTAH'S RESPONSE TO APPLICANT'S MOTION FOR
SUMMARY DISPOSITION ON ISSUES REMANDED BY CLI-00-13
ON UTAH CONTENTION E/ CONFEDERATED TRIBES CONTENTION F"

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's order of January 9, 2001 ("Order (Schedule for Motion to Strike Responses)") and 10 C.F.R. § 2.730, the staff of the Nuclear Regulatory Commission (Staff) hereby files its response to the "Applicant's Motion to Strike Portions of State of Utah's Response to Applicant's Motion For Summary Disposition of Issues Remanded by CLI-00-13 on Utah Contention E/ Confederated Tribes Contention F" (Motion to Strike), filed by Private Fuel Storage, L.L.C. (PFS or Applicant) on January 5, 2001. For the reasons set forth below, the Staff submits that the Applicant's Motion should be granted.

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 December 3, 1999, motion for partial summary disposition of Contention Utah E/Confederated Tribes F (1999 Summary Disposition Motion). See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-06, 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).

On August 1, 2000, the Commission issued its decision on review of the Board's decision in LBP-00-06. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000). Therein, the Commission directed, among other things, that the Board 1) require PFS to submit a model service agreement (MSA), that meets all of the financial assurance license conditions, to the parties and the Board for review; and 2) give intervenors an opportunity to address the adequacy of the MSA to meet the concerns raised in Contention E. *Id.* at 35. The Commission ruled that "if the Board finds intervenors' objections insubstantial, then PFS would be entitled to summary disposition on Utah Contention E." *Id.*

On September 29, 2000, as directed by the Board's August 16, 2000, "Order (Schedule for Submission of Sample Service Agreement)," the Applicant submitted its MSA. In addition, the Applicant submitted a pleading which summarized provisions of the MSA pertinent to PFS' financial assurance commitments. See "Applicant's Submission of Model Service Agreement," dated September 29, 2000. Following this submittal, on October 5 and 6, 2000, the Board established a schedule for the filing of the State's objections to the adequacy of the MSA to meet the concerns expressed in Contention Utah E and for any PFS dispositive motion in connection with the State's MSA-related objections. See "Order

(Scheduling Matters),” dated October 5, 2000 at 1, as modified by “Order (Revising Scheduling Order and Granting Motion to Withdraw),” dated October 6, 2000.

On October 7, 2000, the State filed “State of Utah’s Objections to the Adequacy of the Applicant’s Model Service Agreement to Meet Part 72 Financial Assurance Requirements” (Objections).¹ On December 4, 2000, the Applicant filed its motion for summary disposition (Summary Disposition Motion).² The Staff and the State filed responses to the Applicant’s Summary Disposition Motion on December 20 and December 22, 2000, respectively.³ Thereafter, on January 5, 2001, the Applicant filed the instant Motion to Strike.

In its Motion to Strike, the Applicant identifies seven issues raised by the State in the State’s Response which the Applicant identifies are “improper” issues. See Motion to Strike at 6-10. The Applicant claims that these issues are improper because they either were not remanded to the Licensing Board by the Commission in CLI-00-13 and, therefore,

¹ In addition, as permitted by the Board’s October 5, 2000, “Order (Scheduling Matters),” the State filed “State of Utah’s Motion to Re-Open the Hearing Record on Contention E,” dated November 7, 2000. The Staff and Applicant responded to this motion on November 21, 2000. See “NRC Staff’s Response to ‘State of Utah’s Motion to Re-Open the Hearing Record on Contention Utah E’”; and “Applicant’s Response to State of Utah’s Motion to Re-Open the Hearing Record For Contention Utah E.”

² See “Applicant’s Motion For Summary Disposition on Issues Remanded by CLI-00-13 on Utah Contention E and Confederated Tribes Contention F and Response to State of Utah’s Objections to the Adequacy of Applicant’s Model Service Agreement to Meet Part 72 Financial Assurance Requirements,” dated December 4, 2000.

³ See “NRC Staff’s Response to ‘Applicant’s Motion For Summary Disposition on Issues Remanded by CLI-00-13 on Utah Contention E and Confederated Tribes F and Response to State of Utah’s Objections to the Adequacy of Applicant’s Model Service Agreement to Meet Part 72 Financial Assurance Requirements,” dated December 20, 2000 (Staff’s Response); “State of Utah’s Response to Applicant’s Motion For Summary Disposition on Issues Remanded by CLI-00-13 on Utah Contention E/ Confederated Tribes Contention F,” dated December 22, 2000 (State’s Response).

remain outside of the Licensing Board's jurisdiction; or the issues were not raised in the State's Objections, as was contemplated by the Board's October 5 and 6, 2000 scheduling orders. See Motion to Strike at 4-6.

DISCUSSION

The Staff agrees with the Applicant that issues raised by the State in its Response related to the sufficiency of the License Conditions are outside of the scope of the Licensing Board's jurisdiction, because they are outside of the scope of the Commission's remand to the Licensing Board. See Motion to Strike at 4-5. Indeed, the Commission directed that the two proposed license conditions and other commitments be expressly incorporated into PFS' license. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 32 (2000). Therefore, a challenge to the license conditions would be beyond the Licensing Board's jurisdiction.

The Staff likewise agrees with the Applicant that the Licensing Board's orders of October 5 and 6, 2001 provide for the State to raise its objections and for the Applicant to file a motion for summary disposition based on any objections raised. See Motion to Strike at 5. Any untimely objections thwart the procedure established by the Licensing Board and disadvantage the Applicant. Clearly, the Applicant is unable to respond to objections raised for the first time in a response to the Applicant's summary disposition motion. See 10 C.F.R. § 2.749(a) (beyond the response of the party opposing summary disposition, "[n]o further supporting statements or responses thereto may be entertained"). Therefore, objections that were not raised in accordance with the schedule established by the Licensing Board's order are untimely, prejudicial and not economical to the ends of justice.

With respect to the seven specific issues, the Applicant asserts that each issue was either not raised before in the State's Objections, or was not subject to remand and is not

within the Licensing Board's jurisdiction (Motion to Strike at 6-10). Based upon its review of the seven issues raised by the Applicant, the Staff agrees that each of those issues are either outside of the Licensing Board's jurisdiction, raised for the first time by the State, or both. Therefore, the Applicant has established good cause for its Motion to Strike. See 10 C.F.R. § 2.730.

CONCLUSION

For the reasons set forth above, the Staff submits that the Applicant's Motion to Strike should be granted.

Respectfully submitted,

Catherine L. Marco */RA/*
Counsel for NRC Staff

Dated at Rockville, Maryland
this 16th day of January 2001

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 'APPLICANT'S MOTION TO STRIKE PORTIONS OF STATE OF UTAH'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION ON ISSUES REMANDED BY CLI-00-13 ON UTAH CONTENTION E/ CONFEDERATED TRIBES CONTENTION F'" 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 16th day of January 2001:

G. Paul Bollwerk, III, Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to GPB@NRC.GOV)

Dr. Jerry R. Kline*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to JRK2@NRC.GOV)

Dr. Peter S. Lam*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to PSL@NRC.GOV)

Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the Secretary*
ATTN: Rulemakings and Adjudications
Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to
HEARINGDOCKET@NRC.GOV)

Office of the Commission Appellate
Adjudication
Mail Stop: 16-C-1 OWFN
U.S. Nuclear Regulatory Commission
Washington, DC 20555

James M. Cutchin, V*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail to JMC3@NRC.GOV)

Jay E. Silberg, Esq.**
Ernest Blake, Esq.
Paul A. Gaukler, Esq.
SHAW, PITTMAN, POTTS &
TROWBRIDGE
2300 N Street, N.W
Washington, DC 20037-8007
(E-mail copy to jay_silberg, paul_gaukler,
and ernest_blake@shawpittman.com)

Danny Quintana, Esq.**
Danny Quintana & Associates, P.C.
68 South Main Street, Suite 600
Salt Lake City, UT 84101
(E-mail copy to quintana
@Xmission.com)

Denise Chancellor, Esq.**
Fred G Nelson, Esq.
Laura Lockhart, Esq.
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, UT 84114-0873 (E-mail
copy to dchancel@State.UT.US), and
jbraxton@email.usertrust.com)

Connie Nakahara, Esq.**
Utah Dep't of Environmental Quality
168 North 1950 West
P. O. Box 144810
Salt Lake City, UT 84114-4810
(E-mail copy to cnakahar@state.UT.US)

Diane Curran, Esq.**
Harmon, Curran, Spielberg & Eisenberg
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
(E-mail copy to
dcurran@harmoncurran.com)

John Paul Kennedy, Sr., Esq.**
1385 Yale Ave.
Salt Lake City, UT 84105
(E-mail copy to john@kennedys.org)

Joro Walker, Esq.**
Land and Water Fund of the Rockies
2056 East 3300 South, Suite 1
Salt Lake City, UT 84109
(E-mail copy to joro61@inconnect.com)

Land and Water Fund of the Rockies**
2260 Baseline Road, Suite 200
Boulder, CO 80302

Catherine L. Marco /RA/
Counsel for NRC Staff