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UNITED STATES
NUCLEAR REGULATORY COMMISSION

'98 JUL 29 P4 :42

COMMISSIONERS:

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RULEMAKINGS AND
ADJUDICATIONS STAFF

SERVED JUL 30 1998

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

CLI-98-13

Memorandum and Order

The Commission is considering together two appeals that arise from the application of Private Fuel Storage, L.L.C. (PFS), for a license to store spent nuclear fuel at an Independent Spent Fuel Storage Installation (ISFSI) on the Skull Valley Goshute Indian Reservation in Skull Valley, Utah. Both appeals challenge the Atomic Safety and Licensing Board's rulings on intervention in LBP-98-7, 47 NRC 142 (1998).

The first appeal, taken by PFS, seeks reversal of the Board's grant of intervention to the Confederated Tribes of the Goshute Reservation. The Confederated Tribes represents the interests of one of its members, Chrissandra Reed. The NRC staff and an intervenor, Skull Valley Band of Goshute Indians (hereinafter Skull Valley Band), support PFS's appeal, while another intervenor, the State of Utah, opposes it. The second appeal, taken by Scientists for Secure Waste Storage (SSWS), seeks reversal of the Board ruling that denied it intervention. PFS and the Skull Valley Band support SSWS's appeal; the NRC staff and the State of Utah oppose it. We affirm both of the challenged Board rulings. We also take this opportunity to comment briefly on several other aspects of this adjudication.

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Background

The agency published a notice and opportunity for hearing on PFS's license application in July 1997. The notice set September 15, 1997, as the deadline for filing petitions for intervention. See 62 Fed. Reg. 41,099 (July 31, 1997). The Confederated Tribes, a federally recognized Native American tribe of 450 members, filed a timely response to this notice, as did numerous other potential intervenors. On January 20, 1998, more than four months after the intervention filing deadline, SSWS filed its initial intervention petition. SSWS explained that it was a group of renowned scientists, engineers and educators interested in presenting sound technical and scientific information to the Commission in connection with this proceeding.

The Board received the SSWS petition just prior to the January 27, 1998, prehearing conference, at which the Board heard oral arguments from various petitioners on their standing and on the admissibility of their contentions. Subsequent to the prehearing conference, at the Board's direction, SSWS filed two amendments to its original intervention petition, dated February 2 and 27, 1998.

On April 22, the Board resolved all petitions for intervention. Among other rulings, the Board granted intervention to the Confederated Tribes and denied intervention to SSWS. LBP-98-7, 47 NRC at 170-71, 172-78. The Board granted the Confederated Tribes standing only as an authorized representative of the interests of one of its members, Chrissandra Reed, although the Confederated Tribes had also sought standing in its own capacity. Ms. Reed had provided an affidavit stating that she visits the Skull Valley reservation regularly and is legal guardian of her granddaughter, who also makes frequent visits. Id. at 170-71. Ms. Reed's affidavit expressed concern about the health, safety and environmental impacts of the proposed PFS ISFSI on her and on her granddaughter. The Board acknowledged that the record contained conflicting information about the frequency of Skull Valley visits by Ms. Reed and her

granddaughter, but found that the Reeds' contacts with the Skull Valley reservation are not "so attenuated as to provide an insufficient basis for standing." Id. at 171.

On appeal, PFS argues that the Confederated Tribes lacks standing to represent the health, safety, or environmental interests of Ms. Reed and her granddaughter because these interests are not "germane" to the purposes for which the Confederated Tribes was established. PFS also argues that Ms. Reed's contacts with the Skull Valley reservation are not frequent enough to establish that she would have standing on her own to challenge the PFS license application. The NRC staff, which had conceded the Confederated Tribes' standing before the Board, now urges the Commission to remand the issue to the Board to resolve the uncertainty in the record over the frequency of the Reeds' visits.

As for SSWS, the Board denied intervention as a matter of right because of SSWS's failure to point to an interest of its own directly affected by the proceeding. LBP-98-7, 47 NRC at 176-77. The Board also found that SSWS had failed to demonstrate good cause for petitioning late and had failed to show that it met the other factors recognized by the NRC as weighing in favor of late intervention. Id. at 172-75. Finally, the Board denied discretionary intervention to SSWS, ruling that SSWS's potential contributions to the proceeding, which it saw as overlapping to some extent the NRC staff's safety and environmental reviews, did not outweigh the risk of delay that could result from SSWS's "academic interest" rather than "particular concern." Id. at 173-74, 177-78. On appeal, SSWS argues that the Board abused its discretion in denying discretionary intervention; it does not appeal the rulings on intervention as of right or on the untimeliness of its filing.

Confederated Tribes' Standing

By statute, the Commission must grant intervention to any person "whose interest may

be affected by the proceeding." Atomic Energy Act § 189a; 42 U.S.C. § 2239(a). To determine whether a petitioner's interest provides a sufficient basis for intervention, "the Commission has long looked for guidance to current judicial concepts of standing." Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC __ (1998), slip op. at 4-5; see, e.g., Georgia Inst. of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995); Portland General Elec. Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

Where, as with the Confederated Tribes in the current case, an organization asserts a right to represent the interests of members, " judicial concepts of standing" require a showing that: (1) its members would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires an individual member to participate in the organization's lawsuit. See Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). Longstanding NRC practice also requires an organization to demonstrate that at least one of its members has authorized it to represent the member's interests. See Georgia Tech, 42 NRC at 115.

At issue in this proceeding is whether the Confederated Tribes meets the first and second prongs of the Hunt test.

1. Injury to Ms. Reed

To meet the first Hunt requirement -- that a member of the organization would have standing on her own to intervene as of right in an NRC proceeding -- an organization must allege that one of its members will suffer "a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision." Georgia Tech, 42 NRC at 115. Accord International Uranium (USA) Corp. (White Mesa Uranium mill),

CLI-98-6, 47 NRC 116, 117 (1998); Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). For the reasons discussed below, we agree with the Board that the Confederated Tribes meets this test.

Before the Board, the Confederated Tribes relied on two affidavits filed by Ms. Reed. The affidavits authorize the Confederated Tribes to represent Ms. Reed's interests and state that she is concerned with the impacts of the proposed ISFSI on her own health and safety and on that of her three-year old granddaughter, also a member of the Confederated Tribes. Ms. Reed states that she is the legal guardian of her granddaughter and that, approximately every other week, her granddaughter visits cousins who live on the Skull Valley reservation for visits that last from one night to two weeks. Ms. Reed further asserts that she herself visits the reservation eight to ten times a year. See LBP-98-7, 47 NRC at 170-71.

Ms. Reed's averments are sufficient to establish standing. To begin with, no one challenges the Board's finding that the visits to Skull Valley by Ms. Reed and her granddaughter "bring one or both of them within distances of the facility" that have been deemed "sufficient to provide standing for other participants" in this case. LBP-98-7, 47 NRC at 171. And, while the record contains some conflicting evidence about the exact frequency of the Reeds' visits, nothing in the record contradicts the Confederated Tribes' claim that Ms. Reed and her granddaughter have relatives on the Skull Valley reservation whom they visit regularly. Indeed, the declaration provided by PFS itself (in opposition to standing) concedes that Ms. Reed visits the reservation at least once a year and that her granddaughter visits the reservation three to four times a year "or more whenever Chrissandra needs a place for Michaela [Ms. Reed's granddaughter] to stay." See PFS Answer to the Confederated Tribes Supplemental Memorandum, exh. 1 (Wash Declaration), at 1-2 (Dec. 12, 1997). Thus, PFS's own declaration establishes that the Reeds' familial ties are close (so close that the granddaughter is left alone

with her Skull Valley relatives whenever necessary) and that their visits to Skull Valley, while not on a rigid schedule, are commonplace.[1]

The NRC staff, while not opposing the Confederated Tribes' standing outright (the staff had conceded the Tribes' standing before the Board), suggests that the Commission remand the standing question to the Board with a directive to determine, presumably through a hearing or a further exchange of affidavits, the frequency of the Reeds' visits to Skull Valley. We think a remand unnecessary and likely to result in unproductive collateral litigation. The Confederated Tribes' standing does not depend on the precise number of the Reeds' visits. It is the visits' length (up to two weeks) and nature -- for necessary child care and visiting relatives -- that establish a bond between the Reeds and Skull Valley and the likelihood of an ongoing connection and presence sufficient for standing. Compare, e.g., Dubois v. Department of Agriculture 102 F.3d 1273, 1282-83 (1st Cir. 1996) (a son's "return 'regularly,' at least annually, to his parents' home" sufficient to establish standing to challenge expansion of nearby ski facility), cert. denied, 117 S.Ct. 2510, 138 L.Ed.2d 1013 (1977). Cf. also Georgia Tech., 42 NRC at 117 ("driving by" a reactor daily sufficient for standing); Virginia Elec. and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 (1979) ("recreational" canoeing near reactor sufficient for standing).

We historically have accorded "substantial deference" to Board determinations for or against standing, except when the Board has clearly misapplied the facts or law. See

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[1] At the prehearing conference counsel for the Confederated Tribes stated that the Skull Valley Band had "cut off" the granddaughter's visits. Transcript at 20. Counsel for the Skull Valley Band stated that this was "blatantly not true." Transcript at 24. The Confederated Tribes' statement seems peculiar in that it is against its own interest. Nevertheless, a colorful exchange by counsel at an oral argument is not evidentiary and does not suffice to undermine Ms. Reed's sworn claims that she will continue to visit her relatives and rely on them for child care. However, if any party develops new evidence that conclusively shows that Ms. Reed and her granddaughter will no longer be visiting the Skull Valley reservation, they are free to submit it to the Board on summary disposition, if appropriate, or at hearing and ask the Board to revisit its threshold standing decision.

International Uranium (USA) Corp., 47 NRC at 118; Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996); Georgia Tech, 42 NRC at 116; Gulf States Util. Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994). The Board did not misapply the facts or law here. It reviewed the entire record and reached the reasonable conclusion that Ms. Reed's contacts with the Skull Valley reservation are enough for standing under prevailing judicial and Commission precedent.

2. Germaneness

The second prong of the Hunt test is whether the interest that the organization seeks to represent in a proceeding is germane to the organization's overall purposes. As a general matter, it may seem self-evident that organizations will rarely wish to go to the trouble and expense of litigation to contest matters that are unrelated to their interests. Cf. Consolidated Edison Co. of New York (Indian Point, Units 2 & 3), CLI-82-15, 16 NRC 27, 32 (1982). Nevertheless, PFS argues here that the Confederated Tribes fails the germaneness test. It appears to take the position that the Confederated Tribes has no legitimate interest in the health and safety concerns of its members except when they are on the reservation. The NRC staff does not support PFS's germaneness argument. The Board itself did not discuss it.

In the leading judicial case on the issue, Humane Society of the U. S. v. Hodel, 840 F.2d 45, 58-59 (D.C. Cir. 1988), the court of appeals articulated what it deemed to be a "modest but sensible" test for organizational germaneness. The test requires that "an organization's litigation goals be pertinent to its special expertise and the grounds that bring its membership together." Id. at 56 (footnote omitted). The purpose of the test, according to the court in Humane Society, is to ensure "a modicum of concrete adverseness by reconciling membership concerns and litigation topics by preventing associations from being merely law firms with standing." Id. at 58.

The Confederated Tribes is not the equivalent of a "law firm with standing"; it can hardly be seen as one of the "litigious organizations" that the germaneness test was meant to exclude. See id. at 57-58. To the contrary, the record shows that part of the Tribes' mission is to provide health, safety, social, educational and commercial services for its members. See Affidavit of David Pete at 17, 19 (Aug. 28, 1997), attached to Petition for Leave to Intervene Submitted by the Confederated Tribes (Aug. 28, 1997). As a sovereign body, it maintains a strong interest in its members' welfare as is exemplified by its efforts to provide these various services. With respect to health care, it takes responsibility for its members under any circumstance, even when a member's need for care stems from an illness or injury occurring off the reservation. See Brief of the Confederated Tribes of the Goshute Reservation in Response to the Appeal of Applicant Regarding Standing at 10 (May 8, 1998). The Confederated Tribes is well situated to represent a broad range of health and safety interests of its members on a daily basis and not just for purposes of litigating this case. The Confederated Tribes further cites its health care policy and the United States child welfare laws that permit it to intervene in any state child custody proceeding involving one of its members as support for its proposition that its responsibility for its members does not stop at the border of its reservation. See id. at 10-11, citing the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq.

Beyond bare assertions to the contrary, PFS has not countered with evidence that undermines the Confederated Tribes' claim.[2] For these reasons, we find that Confederated Tribes' interest in the health and welfare of its members, whether on or off the reservation,

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[2] The Skull Valley Band argues that permitting the Confederated Tribes to intervene here would interfere with the Skull Valley Band's sovereign interests in running its own affairs. Taking this argument to its extreme, no party would be permitted to intervene in this proceeding because all intervenors, at least those contesting the facility, would risk interference with the sovereign rights of the Band. This conclusion would of course turn our statutory mandate to permit intervention in our agency proceedings on its head.

sufficiently "germane" to the Tribes' organizational purpose.[3]

Standing of SSWS

SSWS appeals the Licensing Board's finding that it failed to meet the Commission's test for intervention as a matter of discretion under the standards enunciated in Pebble Springs, CLI-76-27, 4 NRC at 616. The Board weighed the various Pebble Springs factors and determined that:

> [G]iven SSWS's failure to show that its contribution to the record will be of particular value (factor one) or that its interests are of the type that this proceeding is intended to encompass or will significantly impact (factors two and three) combined with our conclusion that other means and parties may well represent and protect those interests (factors four and five) and there is the real possibility SSWS participation will inappropriately broaden or delay the proceeding (factor six), we find discretionary intervention is not appropriate in this instance.

47 NRC at 177-78 (footnote omitted).

The Commission considers appeals of Licensing Board rulings on discretionary intervention under an "abuse of discretion" standard. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plan, Units 3 and 4), ALAB-952, 33 NRC 521, 532, aff'd, CLI-91-13, 34 NRC 185 (1991). In the present case, we see no such abuse of discretion. As the Board itself noted, "at first blush" it may seem anomalous to find that admission of SSWS, whose membership includes scientists of unquestioned accomplishment and renown, would be unlikely to add

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[3] The applicant argues that the Confederated Tribes' posture here is no different from that of the organizations that unsuccessfully sought standing in McKinney v. Department of the Treasury, 799 F.2d 1544 (Fed. Cir. 1986), and Medical Association of Alabama v. Schweiker, 554 F.Supp. 955 (M.D. Ala.), aff'd, 714 F.2d 107 (11th Cir. 1983) (per curiam). We disagree. In McKinney, the court held that an organization that did nothing more than "aver[ ] that it is a 'nonprofit public interest law firm'" failed to demonstrate a nexus between its organizational purpose and the economic interests of producers and workers in barring the import of goods. 799 F.2d at 1553. In Medical Association of Alabama, the court rejected a medical association's claim that its physician members' taxpayer interests were related to its organizational purpose even though no physician had joined the association for tax purposes. 554 F.Supp at 964-65. Here, by contrast, the Confederated Tribes has established that part and parcel of its mission is to represent health and safety interests of its members in numerous capacities beyond the scope of the proceeding.

significantly to the development of a sound record. But as the Board explained, the intervention petition was deficient with regard to the specifics of the subject matter of the proceeding, i.e., the PFS application. We agree with the Board that generalized expertise, even scientific eminence, is an insufficient substitute for particularized knowledge of the issues actually in dispute.[4]

In declining to disturb the Board's ruling, we wish to point out, as did the Board, that there are other means by which SSWS can contribute to the proceeding and make its expertise available: as witnesses for other parties, by an amicus filing, or with an appearance under 10 C.F.R. § 2.715(a).

Miscellaneous Matters

No additional issues remain before the Commission on appeal. The Commission is monitoring this proceeding, however, as it does all proceedings. We believe that two admitted contentions, on environmental justice and on financial qualifications, warrant brief comment even at this early stage of the case. We also offer a general observation on the proceeding's anticipated schedule.

1. Environmental Justice

The Board appropriately denied an environmental justice contention submitted by the State of Utah that proposed to litigate the issue of "discrimination in the site selection process."

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[4] On appeal SSWS complains that "the Licensing Board excessively 'front loaded' the requirements for intervention by explicitly expecting intervenors to come to the proceeding with detailed knowledge of specific elements of the application ..." Brief of SSWS in Support of Appeal From Denial of Petition to Intervene, at 6 (May 1, 1998). SSWS's position reflects a basic misunderstanding of what is expected of an intervenor before this agency, particularly an intervenor coming to a proceeding late and seeking discretionary intervention. A petitioner seeking discretionary intervention must "identify with particularity the issues on which it is willing to participate." Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 745 (1978). "[B]road, generalized averments will not suffice." Id. It was therefore reasonable for the Board to conclude that despite the scientific expertise of SSWS's members, their failure to display sufficient special knowledge of this application weighs heavily against granting discretionary intervention.

LBP-98-7, 47 NRC at 203. As the Board recognized, we recently decided in Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 101-06 (1998), that such claims are not cognizable in our adjudicatory proceedings.

The Board did admit an environmental justice contention offered by another intervenor. Ohngo Gaudadeh Devia (OGD), that appears to focus more on disparate impacts, a legitimate issue for litigation under our Claiborne decision (47 NRC at 106-109), than on discriminatory siting. See LBP-98-7, 47 NRC at 233. As framed, however, OGD's contention suggests that PFS's application does not satisfy President Clinton's executive order on environmental justice, Exec. Order No. 12,898, 3 C.F.R. 859 (1995). See id. We remind the Board and the parties of our ruling in Claiborne that President Clinton's executive order stated expressly that it created no new legal rights or remedies; accordingly, it imposed no legal requirements upon the Commission. See CLI-98-3, 47 NRC at 102. "Its purpose was merely to 'underscore certain provision[s] of existing law.'" See id. The only "existing law" applicable to the environmental justice issues in this proceeding is the National Environmental Policy Act (NEPA).

Our Claiborne decision held that "'[d]isparate impact' analysis is our principal tool for advancing environmental justice under NEPA." Id. at 100. The Board admitted OGD's environmental justice contention with the useful caveat that litigation on the contention was "limited to the disparate impact matters" raised in its admitted bases. LBP-98-7, 47 NRC at 233. OGD's contention (with its supporting bases), however, not only alleges "disparate impacts," but also claims that the siting process was not "just and fair." Id. This formulation arguably seeks a broad NRC inquiry into questions of motivation and social equity in siting. As we held in Claiborne, and as the Board held with regard to the State of Utah's environmental justice contention, such questions lay outside NEPA's purview. See CLI-98-3, 47 NRC at 101-06; LBP-98-7, 47 NRC at 203. "The NRC's goal [with respect to analyzing disparate impacts]

is to identify and adequately weigh, or mitigate, effects [of the proposed action] on low-income and minority communities that become apparent only by considering factors peculiar to those communities." CLI-98-3, 47 NRC at 100. See also Council on Environmental Quality Final "Environmental Justice Guidance Under the National Environmental Policy Act" at 8-9 (Dec. 10, 1997). That should be the focus of the Board's environmental justice inquiry.

2. Financial Qualifications

The Board agreed with the NRC staff that the Part 50 financial qualifications provisions are not applicable in toto to Part 72 ISFSI applicants, but should be used as guidance in reviewing the financial qualifications of PFS. LBP-98-7, 47 NRC at 187. This is consistent with our holding last year in Louisiana Energy Services (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 302 (1997), that financial qualifications standards established for reactor licensing do not necessarily apply outside the reactor context. In Claiborne the Commission imposed license conditions that bound the applicant to financial commitments that it had made during the licensing proceeding. Id. at 308-09. The conditions had the effect of assuring financial qualifications and obviating further litigation of these issues. The parties and the Board may wish to consider the feasibility of license conditions in this proceeding, and the possibility that appropriate conditions might avoid difficult litigation over financial issues.

Our financial qualifications standards and other licensing regulations do not require the Board to undertake a full-blown inquiry into an applicant's likely business success. See id. at 308. To the maximum extent practicable, both the NRC staff, in its safety and environmental reviews, and the Board, in its adjudicatory role, should avoid second-guessing private business judgments.

3. Schedule

Recently, in CLI-98-7 (June 5, 1998), we remarked that the Board in this proceeding had

handled the early phases of this adjudication "with admirable dispatch" (slip op. at 5). The Board also seems ready to manage the remaining phases of the adjudication with a similar eye on efficiency and speed. See Memorandum and Order (General Schedule for Proceeding and Associated Guidance), dated June 29, 1998 (unpublished). We see no purpose at this point in attempting to fine-tune the Board's proposed schedule. We urge the Board and the parties, however, to heed the guidance set out in our recently-issued "Statement of Policy on Conduct of Adjudicatory Proceedings," CLI-98-12, 48 NRC __ (July 28, 1998).

Like the Board (see Memorandum and Order, June 29, 1998, at 4), we are concerned that the NRC staff's ongoing safety and environmental reviews of the proposed PFS facility not be compromised or delayed by the demands of the adjudicatory process. In its supervisory capacity, the Commission is pressing the NRC staff (which to some extent is relying on outside contractors) to complete its reviews as promptly as possible. If at any point the NRC staff submits to the Board a sworn affidavit or declaration indicating that hearing, discovery, or other adjudicatory requirements are significantly disrupting or delaying the staff reviews, we would expect the Board to consider staying proceedings or otherwise modifying adjudicatory deadlines or schedules to accommodate the need for a prompt and thorough NRC staff review. Our goal is to see the entire licensing process, including both the NRC staff's review and the adjudication, completed as expeditiously and efficiently as possible.

Conclusion

For the foregoing reasons, the Board decision in LBP-98-7 to admit Confederated Tribes as a party and to refuse admission to SSWS is affirmed.

IT IS SO ORDERED.

For the Commission

John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of July, 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent Fuel Storage Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-98-13) have been served upon the following persons by electronic mail with conforming copies by U.S. mail, first class, except as otherwise noted.

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Docket No. 72-22-ISFSI
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AND ORDER (CLI-98-13)

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Dated at Rockville, MD this
30th day of July 1998

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