

RAS 6390

# ShawPittman LLP

A Limited Liability Partnership Including Professional Corporations

PAUL A. GAUKLER  
(202) 663-8304  
paul.gaukler@shawpittman.com

DOCKETED  
USNRC

May 12, 2003 (3:11PM)

May 2, 2003

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

By Electronic Filing and Mail Delivery

Emile L. Julian  
Assistant for Rulemakings and Adjudications  
Rulemakings and Adjudications Staff  
Office of the Secretary of the Commission  
U. S. Nuclear Regulatory Commission  
11555 Rockville Pike, One White Flint North  
Rockville, MD 20852-2738  
Attn: Docketing & Services Branch

Re: Private Fuel Storage - Docket No. 72-22-ASLBP No. 97-732-02

Dear Mr. Julian:

Today, Private Fuel Storage, L.L.C. is filing two versions of Applicant's Reply to NRC Staff and State of Utah Responses to Applicant's Motion for Reconsideration of Partial Initial Decision Regarding Credible Accidents: a proprietary version and a non-proprietary version. The proprietary version contains confidential commercial and financial information concerning the terms of the Model Service Agreement (previously provided by PFS to the Licensing Board and the Staff and the State) under which PFS would provide spent fuel storage services. For the reasons previously set forth in the 2.790 declarations of John D. Parkyn, Chairman of PFS, of September 28, 2000 and December 4, 2000, PFS requests that the NRC treat the proprietary version of Applicant's Reply as confidential information under 10 C.F.R. § 2.790.

If you have any questions, please contact me at (202) 663-8304.

Sincerely,



Paul A. Gaukler

# ShawPittman LLP

Emile L. Julian

May 2, 2003

Page 2

cc: Michael C. Farrar, Esq.  
Dr. Jerry R. Kline  
Dr. Peter S. Lam  
G. Paul Bollwerk, III, Esq.  
Sherwin Turk, Esq.  
Denise Chancellor, Esq.  
Office of Commission, Appellate Adjudication  
Adjudicatory File, Atomic Safety and Licensing Board Panel  
Diane Curran, Esq.  
John Paul Kennedy, Esq.  
Joro Walker, Esq.  
Timothy Vollmann, Esq.  
Paul Echohawk, Esq.

Document #: 1322912 v.1

May 2, 2003

DOCKETED  
USNRC

May 12, 2003 (3:11PM)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of )  
)  
PRIVATE FUEL STORAGE L.L.C. )  
)  
(Private Fuel Storage Facility) )

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

**APPLICANT'S REPLY TO NRC STAFF AND STATE OF UTAH RESPONSES TO  
APPLICANT'S MOTION FOR RECONSIDERATION OF  
PARTIAL INITIAL DECISION REGARDING CREDIBLE ACCIDENTS  
*[NON-PROPRIETARY VERSION]***

Pursuant to the Memorandum and Order of the Atomic Safety and Licensing Board ("Licensing Board" or "Board") of April 4, 2003,<sup>1</sup> Applicant Private Fuel Storage, L.L.C. ("Applicant" or "PFS") hereby replies to the responses filed by the NRC Staff<sup>2</sup> ("Staff") and the State of Utah<sup>3</sup> ("State") to PFS's March 31, 2003 motion for reconsideration<sup>4</sup> of the Board's March 10, 2003 Partial Initial Decision on Contention Utah K<sup>5</sup> regarding the probability of an aircraft crash at the proposed Private Fuel Storage Facility ("PFSF"). PFS addresses the specific legal questions posed by the Board in its Order and shows that the arguments made by the Staff and the State against PFS's motion are incorrect. Therefore PFS's motion should be granted.

**I. BACKGROUND**

In its Partial Initial Decision, the Board found that the probability of an F-16 aircraft crash into the PFSF was higher than the Commission's criterion for credible acci-

<sup>1</sup> Memorandum and Order (Reconsideration Motion) (Apr. 4, 2003) ("Order").

<sup>2</sup> NRC Staff's Response to Applicant's Motion for Reconsideration of Partial Initial Decision Regarding Credible Accidents (LBP-03-04) (Apr. 21, 2003) ("Staff Resp.").

<sup>3</sup> State of Utah's Response to Applicant's Motion for Reconsideration (Apr. 21, 2003) ("State Resp.").

<sup>4</sup> Applicant's Motion for Reconsideration of Partial Initial Decision Regarding Credible Accidents (Mar. 31, 2003) ("Motion").

<sup>5</sup> Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-03-04, 57 NRC \_\_, (2003).

dents of 1 E-6 per year and thus the facility could not be licensed until the aircraft crash hazard is addressed. LBP-03-04, slip op. at 1-2. PFS requested reconsideration on the grounds that, based on the evidentiary record, the Board could and should have authorized licensing of the facility subject to a condition that the size of the facility be limited such that the aircraft crash probability would remain below the 1 E-6 criterion. Motion at 4. Using the same equations and data in the record as used by the Board, the cumulative probability of an aircraft crash and jettisoned ordnance impact at the PFSF would be less than 1 E-6 per year if the Board imposed a license condition limiting PFS to storing no more than 336 spent fuel casks at the facility. Id. at 4-9. Furthermore, limiting the size of the facility to 336 casks would not invalidate any of the Board's earlier decisions with respect to safety, financial or environmental issues. Id. at 10-12.

The Staff opposed PFS's motion on procedural grounds that PFS's request for a license condition limiting the size of the facility was a "new thesis" that is not properly the subject of a motion for reconsideration. Staff Resp. at 4. The Staff stated, however, that PFS's motion could properly be treated as a request to supplement the record and to consider a new matter of law. Id. at 5. Substantively, the Staff concurred with PFS that the Board could properly decide the calculational matters raised by PFS's motion based solely on the existing evidentiary record and that no further evidentiary presentations should be permitted on those matters. Id. at 7-8. The Staff also concurred with PFS that the proposed restriction on the size of the facility does not implicate or call into question any other safety, environmental, or financial issues or findings with respect to the licensing of the PFSF. Id. at 9; see also id. at 7-10.<sup>6</sup> Finally, the Staff agreed that limiting the size of the facility to 336 casks would reduce the cumulative hazard below 1 E-6 per year, but the Staff would reword PFS's proposed license condition. Id. at 8-9.

---

<sup>6</sup> The Staff suggests that the collateral issues of other safety, financial, or environmental questions would more appropriately be addressed by affidavits in connection with a motion to supplement or a motion to reopen the record, id. at 7, but as discussed below there are no factual matters that need development to resolve PFS's motion even if it were to be considered something other than a motion for reconsideration.

By contrast, the State opposed PFS's motion in all respects. PFS shows below that the Staff's and the State's arguments against PFS's motion are incorrect and that the motion should be granted.

## II. DISCUSSION

### A. Procedural Question

The first question raised by the Board in its Order was, "Does the record reflect a previous request or suggestion for . . . a ruling [that the proposed license condition limiting the size of the PFSF be adopted]? If not, does the Applicant's current request meet the criteria for reconsideration?" Order at 2. The Staff and the State assert that the answer to both questions is no, although the Staff states that PFS's motion could be styled as a request to supplement the record. Staff Resp. at 4-5; State Resp. at 2-5, 7-9.

At the very least, the record reflects PFS's suggestion for a ruling that the PFSF would be licensable with a size limitation. PFS's proposed findings on aircraft hazards noted that its effective area calculation was conservative because full capacity was "a situation that may never be achieved."<sup>7</sup> In its reply findings, PFS showed that a facility with only 200 casks would have an effective area from the perspective of a crashing F-16 of 0.0220 sq. mi. (compared to a full-sized effective area for an F-16 of 0.1337 sq. mi.), which would reduce the crash impact probability accordingly.<sup>8</sup> Additionally, the possibility that the facility might never reach its full capacity of 4,000 casks was discussed at length in the hearing on financial assurance,<sup>9</sup> and is reflected in the various scenarios for which economic cost-benefit analyses were performed.<sup>10</sup> As noted in PFS's Motion at 2-3

---

<sup>7</sup> Applicant's Proposed Findings of Fact and Conclusions of Law on Contention Utah K/Confederated Tribes B (Aug. 30, 2002) at 36.

<sup>8</sup> Applicant's Reply to the Proposed Findings of Fact and Conclusions of Law of the State of Utah and the NRC Staff on Contention Utah K/Confederated Tribes B (Oct. 7, 2002) at 101.

<sup>9</sup> See, e.g., Applicant's Proposed Findings of Fact and Conclusions of Law on Contentions Utah E/Confederated Tribes F and Utah S (July 31, 2000) at 38-39, 55.

<sup>10</sup> See Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah (Dec. 2001) § 8.1 ("FEIS").

and note 4, PFS's Aircraft Report clearly reflects that "the effective area [of the facility and thus the crash impact probability] will increase as spent fuel casks are brought into the facility over the first 20 years of its life and will decrease as the casks are shipped off site during the last 20 years of its life . . . ."<sup>11</sup> Further, the report contained facility effective area calculations assuming 1,000, 2,000, 3,000, and 4,000 casks on site. *Id.* Tab I. The report also noted that the effective area's increase from its very small initial size to the facility's full-size, and subsequent decrease back to its small initial size, made the assumption that the facility would always contain 4,000 casks very conservative with respect to the aircraft crash hazard. *Id.* at 25-27.

Therefore, evidence in the record clearly reflects that if the number of casks at the PFSF were limited, the aircraft crash probability would be reduced. It also reflects that while PFS requested a license for a 4,000-cask capacity facility, there would be no casks on site at the beginning of the facility's life and there might never be 4,000 casks on site. Thus, PFS's request that the PFSF be limited in capacity so as to reduce the aircraft crash hazard can hardly be considered an "entirely new thesis" and is not barred by case law rejecting such theses. The case law emphasizes that to be rejected the thesis must be "entirely new," not one that follows directly from the evidence and the discussion in the proceeding, as shown above to be the case here.<sup>12</sup>

---

<sup>11</sup> Aircraft Crash Impact Hazard at the Private Fuel Storage Facility (as Amended Per Licensing Board Orders – PFS Hearing Exhibit N), August 10, 2000 (Rev. 4) ("Aircraft Report") at 25-26.

<sup>12</sup> See, e.g., Central Electric Power Cooperative, Inc. (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 790 (1981) (new legal challenge to antitrust significance criterion), quoting Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-418, 6 NRC 1, 2 (1977) (entirely new thesis tailored to meet Appeal Board comments petitioner wished to have stricken from prior opinion) (emphasis added); see also Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-25, 56 NRC 467, 474-75 (2002) (new standing claim based on workplace location); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000) (new matters related to DEIS); Sequoyah Fuels Corp. (Source Materials License No. Sub-1010), LBP-94-39, 40 NRC 314, 317 (1994) (newly alleged unreliability of QA audits); compare also Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC 34, 37 (1981) (new claim regarding land expropriation).

The State argues that PFS is asking the Board to “make complex technical judgments and computations” on the storage configuration at the PFSF. State Resp. at 2-3. To the contrary, as shown in PFS’s motion, the calculation of the maximum capacity that would result in an aircraft crash probability of less than 1 E-6 is straightforward and involves no judgments at all. Indeed, the State argued in its proposed findings of fact on this contention that “a licensing board may perform its own, independent calculation.”<sup>13</sup> In a case such as this, a board may impose license conditions to mitigate safety concerns identified during a hearing. See Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-82-48, 15 NRC 1549, 1577-79 (1982).<sup>14</sup>

The State makes several other meritless arguments against PFS’s motion. First, it claims that PFS is not proposing a license condition. State Resp. at 3-4. On the contrary, PFS is proposing a condition that would limit the number of casks at the site, which could be lifted upon a showing that an aircraft crash would have no significant consequences, or modified upon a showing that the aircraft crash probability at the site had decreased.

Second, the State argues that there is no presumption that PFS will obtain a license and that PFS bears the burden of proving that the smaller facility meets all license requirements. State Resp. at 3-4. Those arguments are irrelevant. The issue here is aircraft crash probability. As PFS discussed in its motion, reducing the size of the facility would have no impact on its ability to meet any safety, financial, or environmental requirements.

Third, the State claims that PFS must submit a license application amendment to the Staff before its request can be considered. State Resp. at 4. The State is wrong. A li-

---

<sup>13</sup> State of Utah’s Proposed Findings of Fact and Conclusions of Law Regarding Contention Utah K/Confederated Tribes B (Aug. 30, 2002) at 11 (citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-229, 8 AEC 425, 437, rev’d on other grounds, CLI-74-40, 8 AEC 809 (1974).

<sup>14</sup> See also, e.g., Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 185 (1989); Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-2, 11 NRC 44, 54-55 (1980); Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 163 (1995); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-84-37, 20 NRC 933, 978 (1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 635-36 (1983).

censing board may impose a license condition without the applicant having first requested it in an application amendment.

[A] determination that a proposed design is inadequate can fairly take the form of a decision that a permit will issue on condition that the design be improved to the level which the evidence indicates will furnish reasonable assurance of safety. It would exalt form over substance to insist that we deny a permit outright rather than require the adoption of an improvement established to be satisfactory.

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 53 (1977) (rejecting intervenor claim that an applicant must file new or amended proposal). Moreover, although Staff review will take place in this proceeding, Staff review of the proposed condition is not required before the Board approves it. See, e.g., St. Lucie, supra note 14, ALAB-921, 30 NRC at 185-86 (board finding and imposition of license condition based on applicant calculations was valid without Staff review).<sup>15</sup>

Fourth, the State claims that PFS cannot request the license condition because Contention Utah K allegedly concerns only a facility with a capacity of 40,000 MTU. State Resp. at 8-9. The claim is legally baseless; the fact that an intervenor files a contention against an application does not prevent the applicant from requesting or a board from imposing license conditions to mitigate safety concerns.<sup>16</sup>

Finally, the State claims that to impose a license condition limiting the size of the PFSF the Board would have to impermissibly exercise sua sponte authority. State Resp. at 7-9. The State asserts that PFS proposed a 40,000 MTU facility and thus the Board cannot consider anything smaller. Id. at 9. The State's argument ignores the fact that the 40,000 MTU size was the upper limit of the facility's size. Contrary to the State's claims, as discussed above, the record clearly reflects the possibility that PFS could build and operate a

---

<sup>15</sup> Furthermore, the focus of an NRC licensing proceeding is the applicant's proposal, not the Staff review. Curators of the University of Missouri, CLI-95-1, 41 NRC at 121-22.

<sup>16</sup> The authority cited by the State (Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22 (1998); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 n.11 (1988)) pertains to the allowable scope of contentions, not to the ability of an applicant to request a board to impose license conditions.

facility with less than 40,000 MTU (4,000 casks) on site and that aircraft crashes would pose less of a hazard to a smaller facility. In any event, imposing the requested license condition would not require the Board to exercise sua sponte authority:

Board inquiries within the general scope of matters already raised . . . are wholly appropriate and are not affected by the sua sponte restriction. That rule is intended to preclude major, substantive inquiries not related to the subject matter already before a Board. If the subject matter is already before the Board, a Board is not expected to adjourn a hearing before asking questions that extend somewhat beyond the strict limits of [a party's issues].

Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-12, 15 NRC 354, 356 (1982).<sup>17</sup> As discussed above, it is well established that a licensing board may impose license conditions with respect to matters brought before it as requested here.

In sum, PFS filed a proper motion for reconsideration.<sup>18</sup>

#### **B. Evidentiary Question**

The Board noted that "the layout and the size of the proposed facility was essentially uncontested . . . , as was the appropriateness of the NUREG-0800 factors and the straightforwardness of the formulaic calculation thereunder." Order at 2. It then asked, "Could we therefore proceed to decide the calculational matters raised by the Applicant's Motion simply on the reconsideration pleadings, without providing an opportunity for the submission of factual affidavits (in a fashion akin to summary disposition practice) or an evidentiary mini-hearing?" Id. The answer is yes. As shown in PFS's motion, all of the evidence needed to decide the adequacy of the proposed license condition is in the record

---

<sup>17</sup> See also Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-6, 15 NRC 281, 288 (1982) (The sua sponte rule "does not limit [a board's] exercise of [its] procedural discretion."). The Board statement quoted at length by the State, see State Resp. at 8-9 & n.18, pertained to the hypothetical consideration of an entirely different seismic design approach for the PFSF that would have used anchored casks requiring extensive redesign and analysis, Tr. at 7446 (Farrar). Here the design of the casks and facility remains unchanged. Only number of casks or the facility size is affected.

<sup>18</sup> In this respect, if the Board were to decide that the PFS's motion would be better styled as something other than a Motion for Reconsideration, the Board should act on the Motion as such, for it is well established that a pleading isn't thrown out simply because it has the wrong title. See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 464-65, 468-69 (1991); see also Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-321, 3 NRC 293, 298 (1976).

and was uncontested. See Motion at 4-9. Therefore, no further evidentiary proceeding or affidavits are required. Indeed, as the Staff points out, the basis for determining the effective area of the facility and its use in the NUREG-0800 formula is not properly subject to challenge at this time. Staff Resp. at 6-7. The Board's ruling in its Partial Initial Decision constitutes the law of the case in that respect. Id. (citing cases).<sup>19</sup>

The State asserts that the probability calculation urged by PFS "requires input values unsupported by the record" and that PFS makes no "attempt to identify where these suggested values are found in the record." State Resp. at 5-6. The State's argument is specious. On the contrary, PFS's motion shows the value for each input variable needed to derive the maximum capacity of the facility (336 casks) and where in the record the input is found. Motion at 5, 7-9 (citing to record). Given the input values, the Board can, as the State has previously argued, "perform its own, independent calculation." See supra note 13.

The sole issue of fact advanced by the State is that PFS should have used the generic wing span for small military aircraft of 78 ft., contained in the DOE Standard for aircraft accident analyses, rather than the specific wing span of the F-16. State Resp. at 6-7. This argument is also specious. In calculating the effective area of the PFSF in the Aircraft Report that was the basis for PFS's hearing testimony, PFS used the actual value for the F-16 wingspan of 32.7 ft. Aircraft Report at 15.<sup>20</sup> Both the State and the Staff explicitly concurred with PFS's effective area calculation using this value.<sup>21</sup> PFS did not use the

---

<sup>19</sup> The Staff, however, suggests that the parties should have a further opportunity to point to evidence in the record that they believe would call PFS's submittal into question. However, the ability to call into question the evidence of record in PFS' motion was afforded by the opportunity to reply to the motion – an opportunity which the State and the Staff took advantage of – and yielded only one factual issue (the wingspan input discussed in the text above). No further opportunity beyond the April 21 responses to PFS's motion is required or should be allowed. The parties have had that opportunity and it has now come and gone.

<sup>20</sup> PFS's motion uses precisely the same wingspan value. Motion at 7 & n.17.

<sup>21</sup> State of Utah's Prefiled Testimony of Dr. Marvin Resnikoff Regarding Contention Utah K/Confederated Tribes B at 15, 17 following Tr. at 8698 (citing Aircraft Report); NRC Staff Testimony of Kazimieras M. Campe and Amitava Ghosh Concerning Contention Utah K/Confederated Tribes B (Inadequate Consideration of Credible Accidents) at 27-28 following Tr. at 4078 (citing PFS calculations).

78 ft. for a generic small military aircraft cited in the State's response. It makes no sense to do so when evaluating accidents involving the F-16. The State's argument that one cannot now look at the State's own testimony on the effective area of the PFSF because it was "not germane to the hearing issues," State Resp. at 6 n.12, is baffling. The effective area is one of the four variables in the NUREG-0800 formula and it carries the same weight as each of the other three variables (number of flights, crash rate, and airway width).

The State's claim that there is no basis for taking the layout of the smaller PFSF to be seven columns and six rows of casks, State Resp. at 7, is also meritless. That is the outcome of the analysis. Once one calculates the effective area which reduces the probability to less than 1 E-6, the length and width of the cask storage area ("CSA") follow from the effective area equation and its other variables. Seven columns and six rows of casks then fit within the CSA.<sup>22</sup>

Finally, the State argues that the record lacks sufficient information to recalculate the probability because PFS has not suggested a location for the CSA relative to the location of the canister transfer building ("CTB"). State Resp. at 7. This argument is similarly meritless. As discussed in the Aircraft Report, PFS conservatively assumed that the CSA and the CTB are separated so that their effective areas do not overlap. This conservative assumption produces the largest effective area for the PFSF as a whole. Aircraft Report at 14-14a, Tab R. In its motion, the effective area for CSA is similarly calculated separately. The area of the CTB as previously calculated is then added. PFS Motion at 7-8. Thus, raising this issue is nothing more than an attempt to confuse the record.

---

<sup>22</sup> In any event, the point is moot, in that the proposed license condition (as worded by PFS) limits the length and width of the CSA, so that the CSA can be no larger than that which produces an effective area which results in a crash probability of less than 1 E-6 per year, regardless of the arrangement of the pads or casks inside the CSA. The State's comment about the layout of the CSA for the full-sized facility, State Resp. at 6, is irrelevant, in that the full-sized CSA was not intentionally laid out to minimize its effective area and the State cites no basis for concluding that it was.

### C. Collateral Matters

The Board's third question to the parties was, "Quite apart from the NUREG-0800 formulaic probability calculation, to what extent, if any, does the downsized facility contemplated by the now-proposed license condition implicate or call into question any other safety, environmental, or financial issues or findings?" Order at 2. PFS's motion shows that it does not. Motion at 10-12. Like a low-power reactor license, a small PFS facility would simply be an interim step en route to a full-capacity facility. *Id.* at 11. Essentially, the only practical effect of the license condition, were it to remain in place, would be to require PFS to stop receiving spent fuel casks after two to three years of operation rather than approximately 20 years as currently envisioned. *Id.* at 10. The Staff concurred with PFS that the license condition would not call into question any other collateral issues. See Staff Resp. at 7-10.<sup>23</sup> While the State disagrees with respect to financial assurance and environmental issues, State Resp. at 9-15 as shown below the State is incorrect.

#### 1. Safety Issues

Neither the Staff nor the State identify any safety issue implicated by the proposed license condition, and there is none.

#### 2. Financial Issues

The State asserts that a small facility would have "serious ramifications" for PFS's showing of financial assurance. State Resp at 9-10. The State's arguments are, however, purely rhetorical, and ignore the literal terms and clear implications of the license conditions underlying PFS's showing of financial assurance.

The State notes PFS's statement in its motion that a license for the smaller-sized facility "would not affect the level of funding commitment PFS would have to obtain be-

---

<sup>23</sup> PFS disagrees with the Staff, see Staff Resp. at 7, that the question of collateral issues should be addressed by affidavits in connection with a motion to supplement the record or a motion to reopen. PFS believes that all collateral issues have been addressed based on the current record. The Staff has identified no issues that are not addressed in the current record. See Staff Response at 7-10.

fore beginning construction” under License Condition (“LC”) 17-1 (

[REDACTED]

).

State Resp. at 11, quoting Motion at n. 21. The State goes on to claim that, because the construction funding commitments provided in the Model Service Agreement (“MSA”) for contracts to store 336 casks would be insufficient to meet this condition, “only one conclusion . . . can be drawn:” PFS must be “proposing to contract for space it [would] not have authority to build” under a license for a 336 cask facility. Id. The State totally ignores, however, that License Condition LC 17-1 allows the construction funding commitment to be provided by “equity, revenue, and debt.”<sup>24</sup> Thus, contrary to the State’s erroneous premise, PFS is not limited to commitments provided under the MSA to show that it meets the construction funding commitment specified in LC 17-1. PFS may rely upon other sources of committed funds to meet this condition,

[REDACTED]

Moreover, the obligation would be on PFS to come forward with the additional sources of funding to bridge any gap between the construction funding provided for by the MSA and that called for by LC 17-1. If PFS failed to do so, it could not commence construction of the smaller-sized facility.

The State’s arguments concerning satisfaction of License Condition LC 17-2 for the commencement of operations are equally baseless. LC 17-2 provides that “PFS shall not proceed with the Facility’s operation unless it has in place Service Agreements covering the entire term of the license, with prices sufficient to cover the operating, maintenance, and decommissioning costs of the Facility for the entire term of the license.” Staff Exh C. at 17-9.

[REDACTED]

---

<sup>24</sup> License Condition LC 17-1 states as follows: “Construction of the [PFS] Facility shall not commence before funding (equity, revenue, and debt) is fully committed that is adequate to construct a facility with the initial capacity as specified by PFS . . . .” Staff Exh. C at 17-9 (emphasis added).

[REDACTED].<sup>25</sup>

[REDACTED].<sup>26</sup>

[REDACTED]

Although the State claims that “the entire underpinning of PFS’s financial assurance has collapsed” (State Resp. at 11), nowhere does the State address these key provisions of the MSA that in fact are the “underpinning of PFS’s financial assurance” for operations

[REDACTED]

The State’s only direct discussion of financial assurance for operations cites a reference in the Staff’s SER

[REDACTED]

---

<sup>25</sup> PFS’s Motion for Summary Disposition on the Adequacy of the MSA to Meet Part 72 Financial Assurance Requirements, filed December 4, 2000, describes in detail how the terms of the MSA satisfy the financial assurance requirements of 10 C.F.R. Part 72. See also NRC Staff’s Response to PFS’s Motion for Summary Disposition on the Adequacy of the MSA (Dec. 20, 2000).

<sup>26</sup>

[REDACTED]

[REDACTED]<sup>27</sup>

[REDACTED].<sup>28</sup>

[REDACTED]

29

The State also claims – again with no substantive analysis or basis – that PFS’s new proposal would require the Staff to make complicated legal and factual judgments after license issuance. State Resp. at 12-13. The State, however, fails to point to anything arising from the Facility’s smaller size that would require complicated legal and factual judgments by the Staff.

[REDACTED]

Thus, a smaller-sized facility would not change the Staff judgments originally contemplated for determining whether the license conditions are met. The State’s claims to the contrary are based solely on rhetoric and must be rejected.

### 3. Environmental Issues

The State concedes that direct environmental impacts under the National Environmental Policy Act (“NEPA”) do not come into question with PFS’s proposal, but it claims that the need for, and costs and benefits of, the PFSF do. State Resp. at 13. The State claims that Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 795 (1983), review denied, CLI-83-32, 18 NRC 1309

---

<sup>27</sup> State Resp. at 10, n.19 and 11, n.21; State Motion to Reopen Hearing Record (Nov. 7, 2000) at 12-13.

<sup>28</sup> Applicant’s Submission of Model Service Agreement (Sept. 29, 2000) at 6-7.

<sup>29</sup>

[REDACTED]

. See NRC Staff’s Response to PFS’s Motion for Summary Disposition on Adequacy of the MSA at 7-8.

(1983), quoted in Motion at 12, does not support PFS because “there is no presumption of licensing success” for PFS. State Resp. at 14.

As PFS pointed out in its motion, however, such a presumption is not necessary. Motion at 12 (citing Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC 1587, 1589 (1985)). In Shoreham, the Commission stated that “we do not believe that uncertainty over the pending full-power issues mandates a Supplemental [EIS] or some renewed cost-benefit analysis.” CLI-85-12, 21 NRC at 1589. It noted that full-power licensing faced uncertainties in addition to those created by litigation and state and local emergency planning decisions. Id.<sup>30</sup> Nonetheless, “the EIS for full-power operation satisfied NEPA despite the pendency of Shoreham contested issues.” Id. “Delaying the low-power license [by requiring a supplemental EIS] until that uncertainty is eliminated irretrievably deprives the applicant and its customers of the substantial benefits of early low-power testing.” Id. at 1590 (emphasis added). “In short, the sooner low-power testing is begun, the greater the probability that it will serve the purpose for which it is intended, i.e., to facilitate the earliest possible full-power operation of the plant in the event that the Commission finds reasonable assurance that full-power operation will present no undue risk to the public health and safety.” Id. at 1591 (emphasis added). Here, allowing the PFSF to be licensed with a condition limiting its capacity pending resolution of the accident consequences issue will similarly facilitate the earliest possible full capacity operation of the Facility. Denying PFS’s motion on NEPA cost-benefit grounds would irretrievably deprive PFS and its customers of that benefit. Therefore, in accordance with Diablo Canyon and Shoreham, the Board should impose the requested license condition without requiring a supplement to the PFSF EIS.

The State argues further that the costs of a small PFSF would outweigh its benefits under NEPA. State Resp. at 13-15. The argument is irrelevant. As PFS has stated, Mo-

---

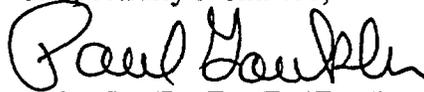
<sup>30</sup> Thus, the State is wrong when it claims, State Resp. at 22 n.25, that the uncertainty facing Shoreham full-power licensing was insignificant. The State’s error is amply borne out by history.

tion at 11, the PFSF with a license condition limiting its size would merely be an interim step en route to the full capacity facility pending resolution of the accident consequences question. "It is well established NEPA law that separate environmental statements are not required for . . . intermediate, implementing steps where an EIS has been prepared for the entire proposed action." Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-84-9, 19 NRC 1323, 1326 (1984).<sup>31</sup> Nor is "the pendency of a contested issue related to full-power operation" a "changed circumstance[]" that would require additional evaluation under NEPA. Id. at 1327.<sup>32</sup> Therefore, the pendency of the accident consequences issue for the PFSF should not require additional NEPA analysis and the Board should impose the license condition and grant PFS's motion.<sup>33</sup>

### III. CONCLUSION

For the foregoing reasons, PFS requests that its motion be granted.

Respectfully submitted,



Jay E. Silberg

Paul A. Gaukler

D. Sean Barnett

SHAW PITTMAN, LLP

2300 N Street, N.W.

Washington, DC 20037

202-663-8000

Counsel for Private Fuel Storage L.L.C.

May 2, 2003

---

<sup>31</sup> Moreover, even if PFS obtained a license for a full-capacity facility, it would not (and could not) be required to operate it at full capacity. Thus, the potential would always exist that PFS would never have as many spent fuel casks on site as were assumed in the EIS for the PFSF and its cost-benefit analysis.

<sup>32</sup> See also Hydro Resources, Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 52 (2001) (supplemental EIS only required where new circumstances "reveal 'a seriously different picture of the environmental impact of the proposed project'").

<sup>33</sup> In any event, the State improperly focuses on the purely economic cost-benefit balance for the PFSF in § 8.1 of the FEIS. State Resp. at 14-15. Under NEPA, the issue is the environmental costs of the project compared to its economic, technical, or other public benefits. E.g., Idaho By and Through Idaho Public Utilities Commission v. ICC, 35 F.3d 585, 595 (D.C. Cir. 1994); Environmental Defense Fund v. Massey, 986 F.2d 528, 532 (D.C. Cir. 1993). Thus, the State improperly neglects, e.g., the benefits of enabling reactors to continue to operate and providing economic and employment benefits to Tooele County and the Skull Valley Band. See FEIS §§ 8.2 & 8.3.

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  
)  
(Private Fuel Storage Facility) ) ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Reply to NRC Staff and State of Utah Responses to Applicant's Motion for Reconsideration of Partial Initial Decision Regarding Credible Accidents [*Non-Proprietary Version*] 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 2<sup>nd</sup> day of May, 2003.<sup>1</sup>

Michael C. Farrar, Esq., Chairman  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
e-mail: [MCF@nrc.gov](mailto:MCF@nrc.gov)

Dr. Jerry R. Kline  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
e-mail: [JRK2@nrc.gov](mailto:JRK2@nrc.gov); [kjerry@erols.com](mailto:kjerry@erols.com)

Dr. Peter S. Lam  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
e-mail: [PSL@nrc.gov](mailto:PSL@nrc.gov)

\*Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

---

<sup>1</sup> PFS is also sending a courtesy copy of its reply to Judge Bollwerk, in that it discusses issues related to financial assurance.

Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
Attention: Rulemakings and Adjudications  
Staff  
e-mail: [hearingdocket@nrc.gov](mailto:hearingdocket@nrc.gov)  
(Original and two copies)

Catherine L. Marco, Esq.  
Sherwin E. Turk, Esq.  
Office of the General Counsel  
Mail Stop O-15 B18  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
e-mail: [pfscase@nrc.gov](mailto:pfscase@nrc.gov)

John Paul Kennedy, Sr., Esq.  
David W. Tufts, Esq.  
Confederated Tribes of the Goshute  
Reservation and David Pete  
Durham Jones & Pinegar  
111 East Broadway, Suite 900  
Salt Lake City, Utah 84105  
e-mail: [dtufts@diplaw.com](mailto:dtufts@diplaw.com)

Diane Curran, Esq.  
Harmon, Curran, Spielberg &  
Eisenberg, L.L.P.  
1726 M Street, N.W., Suite 600  
Washington, D.C. 20036  
e-mail: [dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

Paul EchoHawk, Esq.  
Larry EchoHawk, Esq.  
Mark EchoHawk, Esq.  
EchoHawk PLLC  
P.O. Box 6119  
Pocatello, ID 83205-6119  
e-mail: [paul@echohawk.com](mailto:paul@echohawk.com)

\* Adjudicatory File  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Denise Chancellor, Esq.  
Assistant Attorney General  
Utah Attorney General's Office  
160 East 300 South, 5<sup>th</sup> Floor  
P.O. Box 140873  
Salt Lake City, Utah 84114-0873  
e-mail: [dchancellor@utah.gov](mailto:dchancellor@utah.gov)

Joro Walker, Esq.  
Land and Water Fund of the Rockies  
1473 South 1100 East  
Suite F  
Salt Lake City, UT 84105  
e-mail: [lawfund@inconnect.com](mailto:lawfund@inconnect.com)

Tim Vollmann, Esq.  
Skull Valley Band of Goshute Indians  
3301-R Coors Road, N.W.  
Suite 302  
Albuquerque, NM 87120  
e-mail: [tvollmann@hotmail.com](mailto:tvollmann@hotmail.com)

\* By U.S. mail only

  
Paul A. Gaukler