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NUCLEAR REGULATORY COMMISSION **DOCKETED 08/12/05**

ATOMIC SAFETY AND LICENSING BOARD **SERVED 08/12/05**

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, L.L.C.	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel Storage Installation)	May 27, 2003

MEMORANDUM AND ORDER
(Rulings on Summary Disposition Motion and
Other Filings Relating to Remand from CLI-00-13)

[Note: Although this memorandum and order was originally issued in May 2003, it was treated as a non-public issuance pending review of challenges by intervenor State of Utah to claims by applicant Private Fuel Storage, L.L.C., that pursuant to 10 C.F.R. § 2.790 certain portions of the decision should be withheld from public disclosure as proprietary information. With issuance of the Commission's final decision on that matter, see CLI-05-16, 62 NRC __ (July 22, 2005), this decision is being publically released in a redacted form.]

-- PUBLICLY-AVAILABLE VERSION --

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In CLI-00-13, 52 NRC 23 (2000), the Commission affirmed in part and reversed in part rulings made by the Licensing Board in LBP-00-6, 51 NRC 101 (2000), regarding a motion for partial summary disposition filed by applicant Private Fuel Storage, L.L.C., (PFS) relating to contention Utah E/Confederated Tribes F, Financial Assurance (hereinafter referred to as contention Utah E). As part of its reversal determination, the Commission directed that the Board (1) require PFS to produce a sample service contract outlining the agreements PFS would have with its customers relative to the services it would provide, and compensating payments it would receive, in connection with its proposed Skull Valley, Utah independent spent fuel storage installation (ISFSI); and (2) provide the intervenors to this proceeding, in particular the State of Utah (State), with an opportunity to address the adequacy of the sample service contract relative to the concerns raised in contention Utah E. PFS has provided such a model service agreement (MSA) that, in turn, has spawned additional party submissions, including a

State motion to reopen the evidentiary record and an additional PFS summary disposition request and related motion to strike.

For the reasons set forth below, we deny the State's motion to reopen the record and the PFS motion to strike and grant summary disposition in favor of PFS on contention Utah E relative to the MSA.

I. BACKGROUND

To place our holding on these various pending matters relating to the PFS sample service agreement in context, we describe below the procedural construct that brought these matters before the Board.

A. Licensing Board and Commission Rulings on PFS Dispositive Motion Regarding Contention Utah E

In LBP-00-6, 51 NRC at 106-08, we set forth in detail the procedural history of the admission of contention Utah E, which we will not repeat here. Also in that March 2000 decision, relative to the issues posited by the PFS dispositive motion at issue, the Board found that only two portions of this financial assurance contention needed to move forward to resolution in an evidentiary hearing: paragraph six, as it challenged the adequacy of the PFS-proffered facility construction and operation/maintenance cost estimates, and paragraphs five and ten, as they questioned the adequacy of PFS onsite liability insurance coverage. See id. at 137. In determining that summary disposition was appropriate relative to the other aspects of contention Utah E, the Board found reasonable assurance was provided by two staff-proposed license conditions and commitments by PFS to include various provisions in the service agreements that would have to be executed by its member and non-member

customers, both of which would be subject to staff oversight. See, e.g., id. at 116-17. Moreover, in doing so the Board found this determination warranted referral to the Commission for its immediate consideration. See id. at 136.

Following this summary disposition ruling, in June 2000 the Licensing Board conducted a four-day closed-session evidentiary hearing regarding the matters implicated by paragraphs five, six, and ten. Thereafter, on August 1, 2000, accepting the Board's referral, the Commission found the staff-proposed conditions acceptable and, indeed, directed that a number of the PFS commitments upon which the Board relied be incorporated as license conditions (LCs) as well. See CLI-00-13, 52 NRC at 32. As set forth by the Commission, id. at 27, 32, 36, the license conditions that the staff is to make applicable to the PFS facility, based on promises made by PFS during the licensing process, are as follows:[1]

> [LC-1. PFS shall] not commence construction before funding, in the amount to be determined at hearing, is adequately committed;
>
> [LC-2. PFS shall] not commence operations before service agreements for the life of the license, with prices adequate to fund operations, maintenance, and decommissioning, in the amount to be determined at hearing, are in place;[[2]]

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[1] As the Board noted in LBP-00-6, 51 NRC at 137, the initial license conditions (LCs) were designated by the staff as LC17-1 and LC17-2 based on nomenclature that tied proposed license condition numbering to the section of its December 15, 1999 PFS facility safety evaluation report (SER) to which the condition related, e.g., SER section 17 concerning financial qualifications and decommissioning funding assurance. In this instance, for ease of reference we adopt the same numbering order as the Commission outlined in CLI-00-13, albeit noting that when actually incorporated into any PFS license these conditions may well be numbered differently.

[2] In CLI-00-13, 52 NRC at 32, relative to this license condition the Commission declared that

> proposed license condition LC 17-2 should be revised to read as follows: "PFS shall not proceed with the Facility's operation unless

(continued...)

> [LC-3. PFS shall] include provisions in service agreements requiring customers to retain title to the spent fuel stored and allocating liability among PFS and the customers;
>
> [LC-4. PFS shall] include provisions in the Service Agreements requiring customers to provide periodically credit information, and, where necessary, additional financial assurances such as guarantees, prepayment, or payment bond;
>
> [LC-5. PFS shall] include in the customer service agreements a provision requiring PFS not to terminate its license prior to furnishing the spent fuel storage services covered by the service agreement;
>
> [LC-6. PFS shall] obtain insurance for offsite liability in the amount of $200 million (the maximum amount commercially available); and,
>
> [LC-7. PFS shall] obtain insurance covering onsite liability in an amount to be determined at hearing.

The Commission, however, did not agree with the Board's determination that PFS commitments relative to its service agreements provided a sufficient basis for a reasonable assurance finding based on post-licensing staff inquiry. According to the Commission, without even a draft of the proposed service agreements, there was no basis for determining "within acceptable bounds, what the agreements' terms will be, how inviolate their provisions will be, and how easy it will be for NRC verification reviews to determine compliance." Id. at 34. Consequently, the Commission directed that

> the Board (1) require PFS to produce a sample service contract that meets all financial assurance license conditions, and (2) give Intervenors an opportunity to address the adequacy of the service contract to meet the concerns raised in Contention E. If

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[2](...continued)

> 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."

> Intervenors do not raise further objections after reviewing the sample contract, or if the Board finds [I]ntervenors' objections insubstantial, then PFS would be entitled to summary disposition on Utah Contention E. Otherwise, the contention should be set for hearing.

Id. at 35.

B. PFS Model Service Agreement

In response to this Commission mandate and in accordance with Board orders that outlined a schedule for further party filings, including another PFS dispositive motion, see Licensing Board Order (Scheduling/Administrative Matters) (Aug. 4, 2000) (unpublished); Licensing Board Order (Schedule for Submission of Sample Service Agreement) (Aug. 16, 2000) (unpublished); on September 29, 2000, PFS submitted its MSA, see [PFS] Submission of Model Service Agreement (Sept. 29, 2000) [hereinafter MSA Pleading]. With that agreement, PFS made various, purported nonmaterial changes to the funding scheme it theretofore had proposed relative to its Skull Valley facility,[3]

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[3] In its March 2000 summary disposition ruling, based on the information submitted by PFS in support of its December 1999 dispositive motion the Board described the then-existing PFS funding structure as follows:

> In its license application, describing itself as a limited liability company owned by eight United States utilities, PFS states that its financial qualifications for the requested Part 72 license are, among other things, based on its financing plan to obtain the necessary funds to construct, operate, and decommission the proposed Skull Valley facility. According to PFS, among the financing mechanisms it will use are equity contributions from PFS members pursuant to subscription agreements, preshipment customer payments pursuant to service agreements (through which member and nonmember customers commit to store their spent fuel at the PFS facility and PFS agrees to provide storage services), and annual storage fee payments pursuant to the service agreements. PFS also indicates that it reserves the option to obtain portions of needed construction funds through the

(continued...)

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[3](...continued)

sale of debt securities secured by the service agreements. See [PFS], License Application for Private Fuel Storage Facility at 1-3 to -4 (rev. 0 June 19[9]7).

PFS then goes on to describe its phased approach to construction and operation. Under already completed Steps I-III, PFS undertook preliminary investigations, formed PFS as a legal entity, and prepared and submitted the license application, the last step being funded by direct payments from PFS members pursuant to the subscription agreements. Step IV, which includes this licensing proceeding, detailed design efforts, and bid specification preparations, is ongoing. The $10 million budgeted for this phase is being financed by PFS members payments pursuant to the subscription agreements. See id. at 1-5 (rev. 1 May 1998).

When and if a license is granted, Step V, the construction phase, will begin. This includes site preparation, construction of an access road and various administration, maintenance, and operations buildings and the cask storage pads, canister transfer and transport equipment procurement, and transportation corridor construction. Its $100 million budgeted cost (in 1997 dollars) is to be financed by $6 million dollars in equity contributions from PFS members pursuant to subscription agreements and, in larger measure, by the service agreements with PFS members and nonmember entities that call for payment spread out over the period of time from construction through spent fuel delivery. According to PFS, raising the nonequity portion of Step V costs through service agreements will allow it to avoid construction financing costs, although it retains the option to finance the nonequity portion of Step V costs through debt financing secured by the service agreements. According to the PFS application, no construction will proceed unless service agreements committing for spent fuel storage services in a nominal target range of 15,000 metric tons uranium (MTU) have been signed. See id. 1-5 to -6 (rev. 1 May 1998 & rev. 4 Aug. 1999).

The operational phase for the PFS facility, Step VI, is to be funded by the service agreements. The significant budgeted costs for this phase include procurement and/or fabrication of canisters ($432 million) and storage casks ($134 million), which will be obtained on an as-needed basis to coincide with

(continued...)

including:

1. Rather than relying upon a three-segment preshipment base storage fee and an annual storage fee, under the MSA (section 13.2) PFS would now rely largely on a cost-plus concept that would encompass, in place of the first base payment that was intended to cover construction costs by collecting a sum of $10 per kilogram of uranium (KgU) (in 1997 dollars) multiplied by the customer's agreed upon spent nuclear fuel (SNF) storage "reserved capacity," construction, rail and supplied equipment, and general administrative and operation costs funding would be based on **xxxxxxxxxxxxxxxxxxxxx** in an amount set at the greater of

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[3](...continued)

fuel-moving schedules. According to PFS, all capital costs associated with spent fuel transportation and storage, including canister and storage cask procurement and/or fabrication, will be paid pursuant to the service agreements prior to PFS accepting customers' spent fuel. Also under the service agreements, customers will be required annually to pay ongoing operations and maintenance costs for spent fuel storage, estimated to be $49 million annually for a twenty-year facility operating life and $31 million annually for a forty-year life. These costs include labor, operations support, storage canisters, storage casks, transportation fees, transport and storage consumables, maintenance and parts, regulatory fees, quality assurance and other expenses, low-level radioactive waste disposal, contingencies, radiological and nonradiological decommissioning funds, and associated operating costs. PFS states that the service agreements will include escalators that are tied to specific costs of doing business at the site, including such items as labor rates and NRC and insurance fees. Also, according to PFS, service agreements, which must be signed by PFS members as well, will provide assurance of continued payment by requiring customers to provide annual financial information, meet creditworthiness requirements, and provide additional financial assurances (e.g., advance payments, irrevocable letters of credit, third party guarantees, or payment and performance bonds) as needed. See id. at 1-6 to -7 (rev. 0 July 1997 & rev. 4 Aug. 1999).

LBP-00-6, 51 NRC at 104-06.

(a) **xxx** per KgU multiplied by the number of KgU to be stored at the facility, or (b) **xxxxxxxx** multiplied by the number of canisters (assuming 10,000 KgU per canister). **xxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**, resulting in a pass through to customers of those costs. See MSA Pleading at 4-5.

2. In contrast to its previous indication that storage canister and cask payments to vendors would be made from the lump sum second base payment funds, with any cost increases passed through to the customers, under the proffered MSA (section 13.3) canister and storage cask vendor payments will be the responsibility of the customers, who will also be the owners of the canisters and casks. **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxx**. See id. at 5-6.

3. The MSA (section 13.4) would provide for PFS customer annual payments to cover actual operational and maintenance costs, with each customer being responsible for its proportional share of those costs, which include but are not limited to **xxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxx**, a fixed equity return, and a return on investment. These payments would be due quarterly prior to the beginning of each quarter based on a PFS yearly operational costs estimate with the possibility of an additional payment or credit being assessed to cover a proportional share of any annual operation costs that exceed or fall short of estimated costs **xx**

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxx See id. at 6-7.

4. Decommissioning costs would be borne by customers proportionally under the MSA (section 13.5.1) in that sixty days prior to shipping its first cask during any delivery year, a customer would be required to pay its allocated portion (on a per-canister basis) of the PFS facility's estimated radiological and nonradiological decommissioning costs (including spent fuel cask decommissioning) associated with each canister being shipped that year. The cost estimate is subject to annual adjustment based on inflation and other factors and the customer must pay the allocated portion of any increase within thirty days of receiving a PFS invoice. See id. at 8.

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6. **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**
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7. Although the MSA provides that the customer is the shipper of the spent fuel transported to the PFS facility (section 7), PFS can arrange for all rail transport to the Skull Valley facility, **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**, including those incurred for security and PFS operation and maintenance of (a) rail equipment and the Low Corridor rail line, and (b) ITP operation and maintenance and ITP transportation. See id. at 10-11.

8. In connection with PFS commitments relating to the PFS summary disposition motion and the Board and Commission decisions regarding that motion, the MSA incorporates provisions that (a) specify PFS cannot take any voluntary action to terminate its existence during the MSA term, which must continue until such time as PFS has completed its licensing and regulatory obligations nor can PFS or the customer terminate the agreement after the facility begins operation prior to the end of the MSA term (sections 23 and 24.3); (b) require title to the spent nuclear fuel remains at all times with the owner/customer (section 11.1), which must remove all the fuel at the end of the MSA term at its expense (section 24.4); (c) allocate legal responsibility between PFS and the customer for maintaining nuclear and nonnuclear insurance (section 17) and establish warranty and liability limitations, including limitations on liquidated damages (section 20); and (d) seek to ensure customer creditworthiness by providing for periodic customer financial submissions and an annual PFS customer assessment as well as additional measures, such as customer letters of credit and third-party guarantees, that PFS can invoke if additional financial assurance is necessary. See id. at 12-14.

In response to this PFS submission, by orders dated October 5 and 6, 2000, the Board set a schedule under which (1) PFS was to provide a listing and description of any additional

MSA provisions that embodied variations or changes from representations previously made to the Board about the service agreement in its dispositive motion or evidentiary presentations; (2) late-filed contentions or other submissions addressing the impact of MSA-related variations/changes upon prior Board summary disposition rulings or the evidentiary record of the June 2000 hearings were to be submitted; and (3) a PFS dispositive motion relative to the MSA was to be filed. See Licensing Board Order (Revising Scheduling Order and Granting Motion to Withdraw) (Oct. 6, 2000) at 1 (unpublished); Licensing Board Order (Scheduling Matters) (Oct. 5, 2000) at 1-2 (unpublished). Responding to that order, on October 17, 2000, PFS provided a listing of other changes or variations from previous representations, see [PFS] Identification of Additional MSA Provisions that Embody Changes from Previous Representations (Oct. 17, 2000) [hereinafter MSA Additional Provisions], which included:

1. Although the December 2000 PFS summary disposition filing indicated that (except to the extent debt financing was used) under the then-contemplated customer payment structure for a **xxxxxx** MTU facility, prior to spent fuel shipment it would receive **xxxxxxxxxxxx** out of a total of **xxxxxxxxxxxx** for its services over the twenty-year license term, **xxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**, the percentage of funds it would receive up front would be "somewhat less."[4] Id. at 4.

[4] In making this representation, PFS noted that under the MSA it would receive full payment for canisters and storage casks, radiological and nonradiological decontamination funding, and transportation costs prior to receipt of spent fuel at the facility, costs that would constitute approximately **xx** per cent of the estimated **xxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxx** O&M costs of the facility. Additionally, PFS declared that, unlike under the previously envisioned service agreement terms, it would receive O&M cost payments prior to receipt of customer spent fuel and that the MSA permitted it to reject a customer's spent fuel shipment if it has not made its MSA-required payments. See MSA Additional Provisions at 4 n.6.

2. In contrast to previous PFS statements that it would own the storage casks, the MSA (section 13.3) provides that the customer owns both the canister and the storage cask. Id. at 5.

3. Although PFS member investment, with interest, will still be paid only after PFS O&M costs are covered, under the shift to a cost-plus format, the MSA (section 13.4) provides for a return on investment (i.e., a return to members making initial project phase equity contributions) as well as a return of investment (i.e., the repayment of members' initial project phase equity contributions) for members. See id.

4. Although PFS made evidentiary hearing representations that the first base payment for construction would be subject to an escalation factor up to the time the payment was made, because under the MSA that amount is replaced by **xxxxxxxxxxxxxxxxxxxxxx** that is set at an amount expected to more than account for anticipated escalation through the start of construction, the MSA does not provide for escalation of the **xxxx** amount. The same is true relative to the annual storage fee O&M escalation provisions of the previously described agreement given that customers are now responsible for paying actual O&M costs. See id. at 5 & n.11.

5. In connection with transportation costs, although PFS previously stated that if costs for a given shipment were less than provided for in the third base payment allowance (i.e., **xxxxx** per KgU shipped) it would keep the difference, under the MSA (section 7.2.2) any difference between the customer payment made on the basis of the PFS yearly estimate of costs and the actual costs to PFS will be credited to the customer. See id. at 6.

6. The MSA provides for PFS payments that were not specifically culled out and identified as costs in PFS evidentiary presentations (albeit covered under a cost estimate amount for contingencies), including (a) liquidated damage payments to a customer for failure

to deliver timely PFS-supplied equipment (section 5.2); (b) sums billed to PFS by a customer for decontamination of PFS-supplied equipment prior to customer acceptance and use of the equipment (section 5.3.1); (c) reimbursements to customers for expenses incurred in correcting noncontamination-related defects and deficiencies in PFS-supplied equipment identified at the time the customer receives the equipment (section 5.4.1); and (d) customer expenditures arising from the cost of shipping fuel back to the customer if the fuel is rejected on route to or after it reaches the PFS facility because of (i) a force majeure (i.e., act of God) event that renders impossible or impracticable spent fuel storage or transportation; or (ii) a legal prohibition on PFS arranging for spent fuel transportation or storage (sections 6.4.3(d) and 6.4.4). See id. at 7, 8.

7. The MSA also provides for revenue sources PFS previously had not identified in its summary disposition pleadings or evidentiary presentations, including (a) customer liquidated damage payments for delay in loading canisters with spent fuel or shipping casks onto transportation conveyances (section 5.4.2); (b) customer reimbursement payments for replacing damaged PFS equipment (sections 5.4.2 and 5.4.3); and (c) a per customer **xxxxxxxx** service agreement execution fee. See id. at n.14.

In addition, PFS brought three MSA-related matters to the Board's attention: (1) although the facility would, as represented in the MSA provided to the Board in September 2000, be built in three phases, in contrast to the MSA declaration that each stage would have a 10,000 MTU capacity, the third phase would have a 20,000 MTU capacity, for a total capacity of 40,000 MTU; (2) the dollar amount for the upfront radiological and nonradiological decommissioning payment would be $40,000 per canister (in 1997 dollars), adjusted annually for inflation and any estimated decommissioning cost increases per MSA

section 13.5.1; and (3) an additional provision will be added to the MSA providing, as per PFS evidentiary representations, that set the fees for non-PFS members at a higher level than those charged to PFS members. See id. at 8.

C. State Filing Responding to the PFS MSA/State Motion to Reopen/PFS and Staff Responsive Filings

1. State Response to PFS MSA

On November 7, 2000, the State filed two pleadings relative to the PFS MSA. In the first, asserting that the MSA did not satisfy the Commission's remand or demonstrate PFS was financially qualified under 10 C.F.R. Part 72, the State outlined its objections to the MSA as including the following:

a. PFS has not demonstrated the inviolability of the MSA as required by the Commission in CLI-00-13, which requires that key provisions of the final version of the agreement be incorporated into the PFS license if PFS intends that it be utilized to establish its financial qualifications for a 10 C.F.R. Part 72 license. See [State] Objections to the Adequacy of the [PFS MSA] to Meet Part 72 Financial Assurance Requirements (Nov. 7, 2000) at 5-7 [hereinafter State MSA Objections].

b. The MSA contains representations that are different from, or contradictory to, those made before the staff, the Board, and the Commission during the previous ruling on the PFS dispositive motion, including a significant reduction in its pre-spent fuel receipt funds in hand, a lack of significant cash reserves or liquid assets relative to its potential liabilities, so that the summary disposition record must be vacated. See id. at 7-12.

c. The MSA terms are complex and ambiguous, particularly the concepts of "aggregate usage" and "term." Additionally, **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

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xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx and its overall financial design affords the staff too much discretion, calls upon the staff to make overly complex judgments, and requires continuous staff monitoring of PFS. See id. at 12-23.

d. The PFS business model, which creates a shell that hides the entities that truly control the spent fuel at the Skull Valley facility, i.e., its member-customers, establishes a principal-agent relationship between PFS and its member-customers that require the PFS member utilities to be named as co-applicants for the facility's Part 72 license. See id. at 23-25.

2. State Motion to Reopen

Additionally, on that same date the State filed a motion to reopen the record of the June 2000 evidentiary hearing regarding contention Utah E, subparts five, six, and ten in light of the MSA. See [State] Motion to Re-open the Hearing Record on Contention Utah E (Nov. 7, 2000) [hereinafter State Reopening Motion]. According to the State, such a reopening is necessary because, as proffered by PFS in response to the Commission's remand to the Board, the MSA is inconsistent with the PFS testimony at the hearing as it relates to (1) debt financing of construction and equipment, particularly with regard to debt repayment and interest costs and the uncertainty created relative to the size of the loan amounts available under the MSA loan limit of **xxx**/KgU; (2) operating capital sufficiency, including cost estimation procedures and how

PFS will utilize the **xxxxxxxx** commitment fee; (3) adequacy of the PFS contingencies cost estimate to cover liquidated damage and force majeure costs; (4) newly-identified equity and investment return costs estimates; (5) apparent exclusion of dry transfer system costs; and (6) adequacy of nuclear property insurance, both as to amount and the liability assignment/apportionment "labyrinth" it creates. Id. at 5-18. Citing a Licensing Board decision in Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 530 (1984), in asserting that a less stringent reopening standard is warranted in view of its expense and resource commitment at the hearing and the "eleventh hour" PFS change in its financial assurance demonstration, the State also declared that it meets the 10 C.F.R. § 2.734 standards for reopening the record. Id. at 18-20. According to the State, its motion is timely in accordance with the Board's October 5 and 6 scheduling orders; its motion addresses a significant health and safety issue relative to the possibility under the MSA of significant PFS undercapitalization and a thin revenue stream that could result in "cutting corners" on safety; further consideration of the MSA could result in a materially different result relative to the evidentiary hearing that was held as to the various matters outlined above; and its motion is supported by a knowledgeable individual, Dr. Michael F. Sheehan, who presented testimony on behalf of the State during the June 2000 hearings. See id. at 20-23. Additionally, the State declared that the PFS proffer of its MSA with different representations than were made earlier entitles it to discovery. See id. at 23-24.

3. PFS/Staff Responses to State Motion to Reopen

On November 21, 2000, both PFS and the staff filed responses opposing the State's reopening motion. See [PFS] Response to [State] Motion to Re-open the Hearing Record for Contention Utah E (Nov. 21, 2000) [hereinafter PFS Reopening Response]; NRC Staff's

Response to “[State] Motion to Re-open the Hearing Record on Contention Utah E” (Nov. 21, 2000) [hereinafter Staff Reopening Response]. According to PFS, the scope of the June 2000 hearings on contention Utah E was limited to the issues of the adequacy of PFS construction and operating cost estimates and onsite property insurance coverage. PFS also declared that any prefiled testimony and discussion at the hearing regarding PFS service agreements was in the context of issues relating to cost escalation or the pass through of costs or cost increases to PFS customers, which it asserts was generally true for Dr. Sheehan as well. As such, according to PFS, except for these limited cost issues, its assertions provide no basis for reopening the record. Moreover, as to those noncost issues, PFS likewise declared reopening is inappropriate as these issues clearly would not have the requisite materiality effect on the outcome of the hearing. See PFS Reopening Response at 9-10, 24.

Specifically in this regard, on the matter of the use of debt financing for construction and equipment costs, citing the Commission’s decision in Northern States Power Co. (Monticello Nuclear Generating Plant), CLI-00-14, 52 NRC 37, 49-50 (2000), PFS declared that the Commission has sanctioned the type of cost pass-through provision it envisions in the MSA. Further, according to PFS, the State’s concern about the adequacy of the loan amount if construction is delayed is being addressed in a new MSA provision that the **xxx**/KgU amount for Phase I may be escalated by the industry sector specific indices described in PFS construction cost testimony at the hearing as being applicable to the first base payment under its former funding approach, which the State did not challenge, and by the fact that, even if later phase construction costs escalate beyond what can be covered by these escalators, under the first license condition imposed by the Commission, it cannot start Phase II and Phase III construction unless PFS obtains adequate funding. See id. at 11-17. As to the issues

regarding adequacy of operating capital, PFS maintained that the State's asserted MSA-related concerns about the adequacy of PFS O&M cost estimates are wholly speculative in light of the PFS cost estimate showing at the June 2000 evidentiary hearing and the MSA provision that allows PFS to recoup any costs that it accrues beyond the annual estimates that form the basis for customer **xxxxxxxxx** O&M payments. See id. at 17-18.

Also unwarranted, PFS declared, are State reopening concerns about liquidated damage and force majeure costs for, even putting aside that they would be covered under its contingencies estimate amount, **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxx**. The same is true for the return of equity and return on investment cost concerns posed by the State, according to PFS. See id. at 18-20. As to the dry cask system cost, although PFS declared it is covered under the MSA provision (section 1) regarding "Ancillary Equipment," it further stated that it will modify the MSA definition of "Transfer Cask" to include dry transfer casks. See id. at 20. Relative to the State's nuclear property insurance concerns, PFS observed that an MSA provision (section 17.1.2(b)) stated that it will obtain onsite insurance "in such other amount as may be required by the NRC," which in accordance with the Commission's CLI-00-13 license condition regarding onsite liability insurance and the Board's hearing determination would require it to obtain funding in the amount the State asserts. Moreover, PFS declared that the State's claims about a liability distribution "labyrinth" are without basis, as is apparent under the terms of the MSA, which were intended to be consistent with the standard Price-Anderson Act scheme for allocating liability. See id. at 21-23. Finally, PFS declared that, notwithstanding the State's contrary claims, the Board lacks jurisdiction to vacate its earlier summary disposition record, but must make any additional rulings regarding contention Utah E within the context of that ruling, as it was affirmed and

reversed by the Commission, and the evidentiary record that has been created in the June 2000 hearing. See id. at 24.

For its part, in responding to the State's reopening motion the staff asserted that the State's request for a more lenient reopening standard under the Comanche Peak decision misapplies this decision that, among other things, recognized that an applicant's request to reopen a record was not the same as an intervenor's given the procedural advantages afforded the latter to compensate for application of a higher reopening standard. See Staff Reopening Response at 6-7. Further, in assessing the section 2.734 standards, although agreeing that the State's request is timely, the staff declared that its submission lacked a showing of the requisite safety significance, being based only on unfounded conjecture that PFS will "cut corners." See id. at 8-9. Morever, the staff declared that the State had failed to demonstrate that its particular MSA-related concerns would lead to a materially different result given that none of the matters were relevant to or probative of the construction/operation cost estimate and onsite nuclear insurance issues that were the subjects of the evidentiary proceeding. See id. at 9-10.

In this regard, the staff likewise addressed the specifics of each of the State's MSA-related concerns. On the use of debt financing for construction and equipment costs, the staff declared that having established the validity of its cost estimates in the evidentiary hearing, it is apparent that the PFS approach **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxx** and the cost-plus basis upon which customers now are obligated to provide PFS with revenues to repay loan principal and interest, as well as any other operating cost increases over estimates, provide reasonable assurance that sufficient funds are available such that no issue exists that requires record reopening. The same is true relative to State concerns about the size of the case/canister manufacturing facility relative to early spent fuel

capacity declarations in the service agreements. Regarding the State's arguments concerning the fixed amount of construction and equipment cost funding, the staff asserted that the **xxx**/KgU figure is adequate in that it would make available **xxxxxxxxxxxxxxxxxxxxxxxxxx xxxx** to cover an estimated **xxxxxxxxxxxx** in facility costs (in 1999 dollars), which includes a ten percent contingency factor. Nor is the State correct, the staff asserted, in declaring that the Commission-approved license condition requiring PFS to show it has adequate funding before beginning construction is flawed because it permits approval of the entire 40,000 MTU capacity based on **xxxxxx** amount fixed in year 2000 dollars, which may not provide sufficient future funding. According to the staff, PFS construction costs estimates must include an escalation factor that makes this concern irrelevant. Also irrelevant, the staff declares, are the State's concerns that **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxx**, given the MSA provision (section 13.4) that requires customers to pay a proportional share of all PFS costs. Finally, the State claim that PFS will be precluded from having a satisfactory credit rating because it is **xxxxxxxxxxxxxxxxxxxxxxxxx** provides no basis for reopening, according to the staff, in light of the fact that **xxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**. See Staff Reopening Response at 12-17.

In connection with the State's concerns about insufficient operating capital, like PFS, the staff noted the MSA requirement (section 13.4) that costs of service be paid by customers "without limitation." So too, the staff found immaterial as a ground for reopening the State's assertion that there is no basis for PFS costs of service estimates, given that this billing estimate is distinct from the long-range cost estimates that were at issue under contention

Utah E, and its concern that the **xxxxxxxx** commitment fee need not be credited against a customer's other costs, given that customers must pay their share of the costs in full, regardless of the refundability status of the commitment fee. Further, although the State contended that reopening is necessary to permit consideration of the cost of a force majeure event and liquidated damages resulting from events such as a PFS failure to deliver cask loading equipment on time, according to the staff, it has failed to demonstrate this item would compel a materially different result in light of the PFS cost estimate for contingencies or that cost recovery from customers for these items is unavailable, if they were ever incurred. And relative to the State's arguments regarding the MSA provisions (section 13.4.1; Schedule 4) providing for a return of equity and a return on investment, the staff claimed no showing of a materially different result had been made because the MSA does not change the approach outlined at the June 2000 evidentiary hearing whereby PFS would recover these items only after O&M costs were covered and, in any event, its customers are required to pay a proportional share of all costs, including any increase in actual costs above estimated costs. Relative to the State's assertion about the failure to include dry transfer system costs, according to the staff this likewise lacks the requisite materiality because the cost estimates already provided cover this item, which (like any number of other costs) is not required to be culled out specifically in the MSA. The staff concluded by declaring that the State concerns about insurance coverage also fail to establish there would be a materially different result on reopening, given that the MSA does not alter the insurance commitment made by Mr. Parkyn during the evidentiary hearing, or the cost of that insurance. The same was true for the State's assertion about the purported liability "labyrinth" created under the MSA, and its question about the availability of coverage in the face of legal action following an incident is the type of

conjecture that is wholly insufficient to support reopening and, indeed, is wholly outside the scope of contention Utah E, which concerned the amount of nuclear insurance rather than disputes regarding claim coverage. See Staff Reopening Response at 17-24.

D. PFS Summary Disposition Motion/State and Staff Responsive Filings/State Reply Pleading

1. PFS Dispositive Motion

On December 4, 2000, PFS submitted a response to the State's November 7, 2000 objections to the adequacy of its MSA and request for summary disposition relative to the contention Utah E matters remanded by the Commission in CLI-00-13 for further Board consideration, which it supported with a statement that sets forth twenty-one material facts not in dispute that PFS asserts entitle it to a merits ruling in its favor. See [PFS] Motion for Summary Disposition on Issues Remanded by CLI-00-13 on Utah Contention E and Confederated Tribes Contention F and Response to [State] Objections to the Adequacy of [PFS MSA] to Meet Part 72 Financial Assurance Requirements (Dec. 4, 2000) [hereinafter PFS Dispositive Motion]. As was the case with its earlier dispositive motion regarding contention Utah E, in support of this motion PFS provided the sworn statement of its Chairman, John Parkyn, to which are attached a revised MSA as well as a line-in/line-out version of the MSA that shows specific differences between the revised MSA and the MSA version submitted on September 29, 2000. See id. Declaration of John Parkyn (Dec. 4, 2000) [hereinafter Parkyn Declaration]; id. Parkyn Declaration exh. 1 (Model Agreement for Storage of Spent Nuclear Fuel By and Between [PFS] and ___ (Dec. 4, 2002)); id. Parkyn Declaration exh. 2 (line-in/line-out version of December 4, 2000 revised MSA).[5] According to PFS, the revised MSA contains

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[5] Unless otherwise noted, references in this decision to particular provisions of the MSA (continued...)

changes committed to by PFS in its November 21 reopening motion response, as well as editorial and related changes, clarifications and corrections, and additional terms and conditions, none of which have any substantive effect on the MSA's financial assurance provisions as submitted in September 2000. See PFS Dispositive Motion at 3-4.

a. MSA Meets All Financial License Conditions

In its pleading, PFS first asserts that its revised MSA meets the license conditions mandated by CLI-00-13, see supra pp. 3-4. In connection with LC-1, which requires fully committed funding (equity, revenue, and debt) adequate to construct before any phase of construction is begun, PFS asserted that committed funding is not limited to customer service agreements. Although the MSA (section 13.2) does provide for **xxxxxxxxxxxxxx** sufficient to cover PFS estimated construction costs, contrary to State arguments, it can rely on other committed financing forms besides the **xxxxxxxxxxxxxx** described in the MSA. Relative to LC-2, which mandates that PFS have in place long-term service agreements with prices sufficient to cover its Skull Valley facility's O&M and decommissioning costs for the entire license term, PFS asserted that it fulfills this condition through MSA terms that (1) make customers directly responsible for canister and storage cask vendor payments and other payments (section 13.3); (2) provide for annual payments by PFS customers to cover all PFS costs in performing services and in operating and maintaining the facility, including but not limited to those identified in the MSA (Schedule 4), and otherwise meeting its obligations (section 13.4.1); **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

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[5](...continued)
are to the version included as Exhibit 1 to the Parkyn Declaration submitted in support of the December 4, 2000 PFS dispositive motion.

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xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx According to PFS, notwithstanding the State's arguments that this arrangement is inadequate because PFS will have no assets, it is in fact sufficient to establish the requisite reasonable assurance in that LC-2 only requires the agreements to have "prices sufficient to cover," costs, not cash or other assets in hand, which is consistent with the recent Commission Northern States Power precedent, and PFS will hold significant assets, such as its license and spent fuel storage contracts. See PFS Dispositive Motion at 4-5.

So too, PFS declared its MSA fulfills the other pertinent Commission-mandated license conditions. In connection with LC-5, under which PFS is not permitted to terminate its license before it has provided all agreed spent fuel storage services under its service agreements and completed its licensing and regulatory obligations, PFS maintained that it has fulfilled this condition through MSA terms that (1) declare PFS shall not take any voluntary action to terminate its existence during the service agreement term (section 24.3.4); (2) provide that the service agreement term shall continue until such time as PFS has completed its licensing or regulatory obligations under the license and the license is revoked or terminated (section 23); and (3) preclude either PFS or its customers from terminating the agreement from the beginning of facility operation through the end of the service agreement term (section 24.3.1). See id. at 6.

Regarding LC-3, which directs PFS to incorporate service agreement provisions that assign legal and financial responsibility between PFS and its customers, including an acknowledgment that each customer retains title to its spent fuel throughout the storage period,

this condition is fulfilled, PFS argued, given MSA provisions that (1) provide that the title to spent fuel remains with the customer at all times (section 11.1); (2) provide the customer is responsible at all times for cleanup costs of any contamination it causes (section 13.6); (3) make the spent fuel customer or owner responsible for removing all its fuel from the site at the end of the service agreement term at its sole cost and expense (section 24.4); (4) define the responsibilities of the service agreement parties to maintain nuclear and nonnuclear-related insurance (section 17); (5) identify PFS warranty and liability limitations (section 20); (6) provide that PFS liability for all claims arising under the MSA (other than liquidated damage claims as defined under MSA section 5.2) is not to exceed the amount PFS obtains under insurance policies for such claims (section 20.3). According to PFS, as it noted in its response to the State's reopening motion, the State's claim of a liability labyrinth is based on its misunderstanding of the terms and interrelationships between the various nuclear insurance policies. See id. at 6-7.

Finally, in connection with LC-4, which requires PFS to include service agreement provisions requiring customers periodically to provide credit information, and, where necessary, additional financial assurances such as guarantees, prepayment, or payment bond, PFS declared that MSA section 15, along with the schedules and exhibits it references, fulfill this requirement in that (1) customers are to provide annually specified financing information, including Securities and Exchange Commission (SEC) filings and independently audited financial statements (Schedule 3); (2) customers may be required to provide further financial assurances if (i) PFS evaluation of the submitted information indicates the customer's financial condition is unsatisfactory or presents a credible risk of not being able to meet its PFS financial obligations, (ii) PFS has not received the information it needs to make its evaluation, or (iii) the

customer meets any of the conditions in MSA section 15.2.1(c);[6] (3) a customer required to provide further assurance can do so by (i) making an advanced payment specified by PFS; (ii) having a standby irrevocable letter of credit, (iii) obtaining a third-party guarantee of the customer's payment and performance obligations by an entity acceptable to PFS, and (iv) getting a payment and performance bond from an entity acceptable to PFS; and (4) unless PFS specifies another amount, the amount of the customer assurance must be equal to the customer's total obligations to PFS, including any amount necessary to remove the customer's fuel from the PFS facility. See id. at 7-8.

b. PFS Response to State's MSA Objections

After detailing how the MSA fulfills the license conditions imposed by the Commission, in its pleading PFS goes on to address the four general objections to the MSA proffered by the State in its November 7 filing. On the first matter -- the purported lack of MSA "inviolability" and the need to incorporate the MSA into a license condition -- PFS asserted that the Commission's use of that term in CLI-00-13 was intended to denote a concern that an MSA not have loopholes that would allow PFS or its customers to avoid or break PFS commitments, such as permitting customers to avoid payments while leaving the fuel with PFS or PFS to voluntarily dissolve and leave the facility without an owner/operator. According to PFS, the State has not

[6] MSA section 15.2.1(c) indicates those conditions include (i) material adverse change in financial condition since entering into the service agreement; (ii) thirty days have elapsed since a failure to pay or perform a material obligation or a default under an agreement or document that evidences a customer indebtedness of more than ten million dollars; (iii) a customer having suspended or discontinued its business, generally failed to pay debts, filed for bankruptcy, applied for custodian appointment for its assets or property, become insolvent or subject to liquidation or debt reduction; (iv) customer transfer of a substantial portion of its assets to another person; (v) customer transfer or assignment to another person of its rights and obligations under the service agreement; (vi) failure to make any of the fee, loan, vendor or other payment due under sections 13 and 14 of the service agreement; and (vii) loss of customer authorization to possess spent fuel. See Parkyn Declaration, exh. 1, at 38.

argued that such loopholes exist in the MSA. Moreover, PFS contended that the use of the term "inviolate" was not intended to require MSA incorporation into the license. Instead, the MSA is intended to provide guidelines that are sufficient to allow the staff to ensure during the conduct of its verification review that the actual contracts meet the Commission's expectations as reflected in the license, similar to the model documents provided in Regulatory Guide 3.66 relative to the adequacy of material licensee bonds or letters of credit. Further, PFS asserted that State concerns that absent incorporation into the license, MSA terms will be only illustrative and subject to PFS revision at will fails to recognize the Commission's own statement that actual customer contracts did not have to "slavishly" follow the MSA and the fact that PFS changes would be subject to staff review. See id. at 8-11.

Relative to the second item -- the need to vacate the Board's prior summary disposition holdings in light of the new MSA provisions -- addressing first the purported legal deficiencies in the State's claim, PFS asserted that the matters before the Board on remand, as defined by the Commission in CLI-00-13, are whether the MSA meets (1) the financial assurance license conditions imposed; and (2) the concerns raised in contention Utah E. In this light, the mere fact there were changes to the MSA is irrelevant; instead, the focus must now be on whether there is any material factual dispute on whether the MSA, as revised, fails to satisfy either the license conditions or the concerns raised in connection with contention Utah E. PFS also declared that the State's argument in this regard is legally flawed as it attempts to read into CLI-00-13 a Commission intent to require that PFS must have an unspecified amount of cash on hand prior to beginning facility construction or operation. According to PFS, all that is required under LC-1 and LC-2 is that PFS have funding fully "committed" prior to construction and that its "prices" are sufficient to cover facility O&M and decommissioning costs, which are

consistent with the Commission's earlier determination. See GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193 (2000). Finally, PFS asserted that as a legal matter, any contention Utah E issues that do not involve the PFS service agreements are outside the scope of the Commission's remand and thus not subject to further litigation. See id. at 11-12.

Also with regard to the second item, PFS asserted that the State's request to vacate the entire summary disposition record for contention Utah E likewise has faulty factual underpinnings. First among these is the State's concern that previously PFS had committed to having **xxxxxxxxxxxx** out of a total of **xxxxxxxxxxxx** on hand prior to receiving any spent nuclear fuel, but will now have only **xxxxxxxx** plus any contractual commitments and loans. In fact, under its previously outlined plan and as was testified to by Mr. Parkyn at the June 2000 evidentiary hearing, PFS would only have had in hand the first of the three base payments, amounting to **xxx**/KgU for the 10,000 metric tons involved (**xxxxxxxxxxxx**), while the second and third base payments, amount to **xxx**/KgU, would have come only prior to receipt of the specific canisters. PFS also pointed out that this assertion is inconsistent with arguments made by the State about the lack of an adequate PFS revenue stream in its proposed findings relating to the contention Utah E issues heard in June 2000. Yet most important, according to PFS, is the fact this argument fails to show that under the MSA, PFS costs will not be covered, given the legal obligation created by the MSA for customers to make regular, **xxxxxxxxx** payments to cover all PFS estimated costs, **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxx**, and to pay actual costs accrued beyond those estimates **xxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxx**. See id. at 12-16.

In connection with the third item -- claims about the inadequacy of MSA terms and provisions -- PFS noted first that although the State claims the MSA is “ambiguous,” as to those terms about which the State raises a specific claim, the Commission’s financial assurance requirements are met. Also unavailing, PFS maintained, is the State’s challenge to the purportedly “complex” MSA because it relies solely on customer revenue and it requires the staff to engage in the type of post-review analysis that the Commission warned against in CLI-00-13. According to PFS, its reliance on revenue is not inconsistent with the Commission’s finding of reasonable financial assurance relative to the reactor licensee in the Oyster Creek decision, and the State’s claim about the complexity of staff review is entirely unsupported. See id. at 16-17.

Relative to the specific matters that the State declares ambiguous, although labeling meritless the State’s claims about the terms “calculated based upon” and “term” as they are used to determine “aggregate usage” in MSA section 13.4.2 to calculate a customer’s proportionate share of the PFS costs of service, **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxx**. As now revised, **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**, with the time a customer stores its fuel not being a computation factor. Another supposed uncertainty relating to the potential for customers to have to pay PFS after the customer’s fuel has left the Skull Valley facility or after the customer has left the nuclear industry is also without substance, PFS maintained. As to the latter situation, PFS pointed to MSA section 15.2.1, which makes customers that experience a

material adverse change or are no longer authorized to possess spent nuclear fuel subject to MSA section 15.2.2 that requires such customers to provide additional assurance of their ability to cover their obligations. Further, with regard to the customer that is obligated to pay after its fuel has left the facility, PFS asserted that the State has provided nothing other than speculation to support its premise such an entity still in the nuclear business that otherwise did not trigger MSA section 15.2.1 would pose a default risk. See id. at 17-18.

Also claimed by the State to be inadequate, PFS noted, are **xxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**. Also groundless, according to PFS, is the State's claim that construction delay could cause costs to escalate beyond the MSA-provided **xxxxxxxxxxxxxxxxxxxxxx**/KgU so as to cause PFS to cut corners, given the PFS Phase I cost estimate is **xxxxxxxxxxxxxxxxxxxxxx** less than the amount it will have available for construction and the PFS determination to place a **xxxxxxxxxxxxxx** escalator into the MSA. See id. at 18-19.

Another series of State-identified inadequacies PFS sought to address are those relating to customer responsibility for repaying PFS indebtedness. The State's concern that the PFS cost recovery scheme presumes a forty-year term is baseless, according to PFS, because it is a plausible assumption that PFS at the end of its initial twenty-year term will be able to

obtain a renewed license. Also without merit, PFS maintained, is the State's claim that linking a **xxxxxxxxxxxxxxxxxxxxxxxxx** to its fuel delivery years builds in a normal operations revenue stream deficiency. Although asserting that the last sentence of MSA section 13.5.2 originally submitted to the Board would address this problem by covering any **xxxxxxxxxxxxxxxxxxxxxx xxxxxxxx** deficiency, PFS nonetheless indicated that it had revised that section to address this concern. Under this revision, regardless of PFS customer fuel delivery schedules, **xxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xx**. Further, PFS declared that a State concern that MSA section 13.5.2 is deficient because it does not consider the apportionment of costs when construction costs are not fixed at **xxxxxxxxxxxx** and does not allow a revenue shortfall determination is meritless because MSA section 13.2 covers PFS indebtedness, whatever it comes out as and without regard to the **xxxxxxxxxxxx** amount. See id. at 19-20.

State claims regarding PFS customer creditworthiness also were rejected by PFS as being without substance. Relative to the State's argument that PFS does not know its costs and the MSA lacks a term, PFS relied upon its evidentiary showing during the June 2000 evidentiary hearing and declared that the MSA customer storage schedule (MSA Exhibit A-1) does not allow a customer to store beyond two consecutive twenty-year license terms. Insubstantial as well, PFS declared, is the State's assertion that over time as customers decommission their facilities, sending the fuel back as a remedy for lack of payment or other defaults will become increasingly ineffective in light of MSA sections 15.2.1 and 15.2.2 that allow PFS to seek further assurance in the event of a customer's business changes or it

relinquishes its fuel possession license. Also lacking sufficiency, according to PFS, is the State's claim that the MSA is deficient in that PFS customers will be entities of various types, some without adequate assets of their own. This State argument, PFS asserted, does not recognize the MSA provisions (sections 15.1 and 15.2; Schedule 3) that allow PFS to evaluate the financial health of a potential customer before fuel delivery to ensure they can manage their financial obligations and provide the ability to impose further financial assurance requirements. Nor, for the same reason, did PFS find merit in the State's concerns about the ability of PFS to identify customers that are in failing financial health or to return spent fuel to a customer that becomes insolvent, particularly in light of the Commission's indication in CLI-00-13 that even a not insignificant possibility that financial assurance-related assumptions and forecasts will turn out unfavorably is not sufficient to negate a reasonable assurance finding. Finally, PFS again relied upon the Commission's Oyster Creek precedent regarding the use of operating revenues for a financial assurance finding as demonstrating the inadequacy of the State's assertion that the MSA is deficient because it allows PFS to operate on a "just-in-time" cost recovery basis with respect to its revenues. See id. at 20-22.

The last State-identified MSA deficiency addressed by PFS in its motion is the purported improper latitude the MSA affords the staff in the course of its post-licensing financial assurance review. This is clearly nothing more than speculation, according to PFS, given the clearly defined scope of the PFS project, its schedule, and its construction and O&M costs; its nonspeculative revenue stream as required by the license conditions affirmed by the Commission in CLI-00-13; its perfectly legal reliance upon operating revenues, guaranteed under contract, to provide assurance costs will be covered; and the established presumption

that the staff will not permit a material change in the MSA in contravention of any Board decisions or Commission directives. See id. at 22-23.

c. PFS Members as Licensees

As a final matter, PFS sought to deal with the State's legal claim that PFS members are really de facto owners of the Skull Valley facility and, as such, must be named as licensees. Besides asserting this claim should be struck as beyond the scope of contention Utah E, PFS declared it is clear that a limited liability entity like PFS can be the sole licensee of an NRC-licensed facility. According to PFS, this is true even when the limited liability entity is wholly owned by a parent corporation and the parent is providing a financial guarantee to support the financial qualifications of the limited liability entity, nor do the agency cases cited by the State in support of its argument sustain a contrary conclusion. PFS concluded that because the PFS members will have neither ownership interest in nor operating authority over the PFS facility, they are not licensees. See id. at 23-25.

2. State Dispositive Motion Response

In its December 22, 2000 response to this PFS dispositive motion, the State argued that a ruling in favor of PFS would be totally inappropriate, a position it supported with a statement that outlined thirty-eight relevant, material facts in dispute. See [State] Response to [PFS] Motion for Summary Disposition on Issues Remanded by CLI-00-13 on Utah Contention E/Confederated Tribes Contention F (Dec. 22, 2000) [hereinafter State Dispositive Motion Response]. And, as was the case regarding the initial PFS summary disposition motion, in support for its response, the State provided the affidavit of Dr. Michael F. Sheehan. See id. Declaration of Michael F. Sheehan, Ph.D. (Dec. 22, 2000) [hereinafter Sheehan Declaration].

The State first declared that the substantive terms and conditions of the PFS service agreement must be made a license condition because, as the recent material changes in the PFS scheme for funding construction and O&M costs illustrate, it is an evolving document that contains the type of ambiguity the Commission eschewed in CLI-00-13. See id. at 7-9. Further, the State asserts that the MSA does not provide the requisite reasonable assurance in the following ways:

a. Cash Reserves

PFS assertions that it has no obligation to maintain any significant level of reserves, including cash reserves demonstrate clearly, the State maintained, that it lacks the requisite financial qualifications. According to the State, reserves are a mainstay of a prudent business operation. Without such reserves, the State contends PFS reliance on customer billing and the "price" it has set for its services is not adequate, particularly given the volatile power market and the near bankrupt status of some major utilities. Indeed, according to the State, even if all PFS customers paid their storage fees on time, PFS may have a deficiency that would not allow it to safely run the facility and its thin capitalization and nondiversified, single business line will preclude access to ready credit, all of which support a determination that PFS has failed to establish it is financially qualified. See id. at 11-12.

b. Change from "Aggregate Usage" to "Reserved Capacity"

The State also asserted that, although ostensibly to satisfy expressed State concerns, the PFS change from using "aggregate usage" to utilizing "reserved capacity" to allocate costs among its members illustrates the fundamental flaw of relying solely on contract drafting as a mechanism for establishing financial qualifications. PFS has failed to amend all MSA provisions to incorporate this change, the State declared, creating a situation in which it may

not be able to **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**
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xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. Further, according to the State, if a customer decides to withdraw some or all of its stored SNF, although the MSA provides that the customer remains obligated for its proportional share of PFS costs for the remainder of its service agreement storage schedule, this does not recognize that in adopting the "reserved capacity" concept the agreement decouples cost allocation from a customer's storage schedule. Because such a withdrawal does not cause a proportional reduction in the cost of service and there is no change in the aggregate reserved capacity, there is no basis in the agreement for reallocation of this abandoned cost share to other customers, leaving PFS stuck with those abandoned costs, which could be substantial if customers departed for a DOE repository or monitored retrievable storage facility. See id. at 12-14.

c. Construction Loans

Although noting that PFS has provided that if there is a delay in Phase I construction, an escalator (MSA Schedule 5) would become applicable to increase loan allocation of **xxxxxxx**
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, the State considered this inadequate because (i) **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx; and (ii) there is no escalator for Phase II and Phase III construction costs. The State asserted that a reasonable assurance finding can be made only if customers will be responsible for actual construction

costs, particularly given that PFS will have a junk bond credit rating with unsecured loans and no capital or liquid assets and any promissory notes from its members or customers will not demonstrate any PFS ability actually to obtain funds in light of the current general instability in the energy market and utility operator finances. See id. at 14-15.

d. Adequate Operating Revenues

In connection with the PFS legal arguments that the Commission's Oyster Creek and Vermont Yankee decisions permit it to rely on operating revenues guaranteed under a customer contract in making its financial assurance showing, the State argued that these cases are inapposite because they apply to nuclear power plant operators, which have a product to sell -- electricity -- and an assured market or rate base to provide revenues. In contrast, the State maintained, the only PFS product is the storage of another entity's liabilities -- spent nuclear fuel -- and it has an assured rate base that is no better than its ability to obtain payments for fee defaults after protracted litigation. See id. at 15-17.

e. Cost Recovery and Customer Creditworthiness

The MSA, according to the State, is deficient in that it fails to disclose how PFS will recoup its multimillion dollar capital investment in developing and using its dry cask transfer system and contains an ambiguity regarding whether the intermodal transfer facility (ITF) or the Low rail line will be built. Further, the State asserted, the MSA provisions to address customers with financial difficulties, including advance payments, letters of credit, guarantees, and performance bonds are inadequate in that by the time PFS realizes there is a problem, it will be too late to effectively employ these mechanisms. Nor is the remedy of returning the fuel adequate. See id. at 17-18.

f. Other Concerns

Although PFS has indicated that cask and canister costs are now to be borne directly by PFS customers, according to the State, the MSA undermines this assertion because there are uncertainties about the relationship/contractual obligations between cask/canister supplier Holtec and PFS. **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** Further, according to the State, the MSA assignment provision leaves open the possibility that fuel could come to PFS from another Part 72 licensee, thus creating questions about the utility's Price-Anderson Act coverage of the fuel that requires a re-evaluation of the MSA insurance provision. See id. at 18.

Also troubling to the State is the purported degree to which the MSA will require that the staff make the type of complex legal and discretionary judgments that the Commission purportedly eschewed in CLI-00-13. Initially, the State challenges the PFS declaration that service agreement changes would be subject to staff review, noting that the staff must be aware of such changes, must evaluate whether they are significant, and then determine whether they provide comparable reasonable assurance to the provisions of the MSA now before the Board. Moreover, according to the State, given the clearly evolving nature of the MSA and the fact the MSA itself contains a provision (section 13.2) that permits PFS and its customer to negotiate alternative provisions that provide comparable reasonable assurance, even if such a review were held it inevitably would require the staff to make the types of

judgments the Commission has declared inappropriate, unless a carefully crafted MSA that meets the State's concerns is included as a license condition. See id. at 18-20.

In conclusion, the State declared that, as these items and the lack of State discovery demonstrate, the record of this proceeding is incomplete, leaving various material factual disputes such that a Board grant of summary disposition in favor of PFS would be wholly inappropriate. See id. at 20-21.

3. Staff Summary Disposition Response

In its December 20, 2000 response to the PFS summary disposition motion, which was supported (as was the case with the first PFS summary disposition motion regarding financial assurance matters) by the affidavit of Financial Analyst Alex F. McKeigney and Senior Level Licensee Financial Policy Advisor Robert S. Wood, the staff reached a different conclusion. See NRC Staff's Response to "[PFS] Motion for Summary Disposition on Issues Remanded by CLI-00-13 on Utah Contention E and Confederated Tribes Contention F and Response to [State] Objections to the Adequacy of [PFS MSA] to Meet Part 72 Financial Assurance Requirements" (Dec. 20, 2000) [hereinafter Staff Dispositive Motion Response]; id. Affidavit of Alex F. McKeigney and Robert S. Wood Concerning Utah Contention E (Financial Assurance) (Dec. 20, 2000) [hereinafter McKeigney/Wood Affidavit]. In this regard, the staff began, as had PFS, by analyzing the revised MSA relative to each of the non-insurance related license conditions outlined by the Commission in CLI-00-13.

Concerning LC-1 regarding construction funding, the staff asserted that the combination of funding mechanisms provided by the revised MSA are consistent with that condition. The staff pointed to the fact that, in addition to the **xxxxxxxx** nonrefundable commitment fee required of each customer shortly after service agreement execution, **xxxxxxxxxxxxxxxxxxxx**

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. Noting also that the LC-1 terms do not limit PFS to the service agreements as the only source of committed funding, the staff concluded that the revised service agreement is consistent with that license condition. See id. at 6-7.

Relative to LC-2, the staff asserted that the revised MSA fully implements this provision by indicating that a service agreement will cover the entire term of any PFS license from the date the agreement is executed to the date the PFS license is terminated or revoked, subject only to conditions pertaining to the ability of PFS to begin initial facility operation. Further evidence of compliance with LC-2 is evident, according to the staff, by the agreement's provisions covering facility O&M and decommissioning costs that require customer payments associated with transportation, storage cask and canister vendor payments, facility operations/performance of services, customer loans, and decommissioning. See id. at 7-8.

LC-3, which concerns SNF ownership and liability allocation, is appropriately implemented by the revised MSA, the staff declared, with its provisions that require customers/owners to retain title to the SNF at all times and delineate responsibility between PFS and its customers for decontamination expenses, insurance, and indemnification/liability and defenses limitations. So too, the staff maintained, LC-4 relating to customer creditworthiness is properly implemented by the revised MSA provisions requiring at least annual (and more frequently if conditions warrant) customer submission of, and PFS determinations regarding, financial/creditworthiness information, and furnishing PFS with authority to require additional customer financial assurances, including advance payments,

irrevocable letters of credit, third-party guarantees, and performance bonds. Finally, the staff asserted that the revised MSA makes it clear that PFS will not voluntarily terminate its responsibility for the Skull Valley facility before providing all agreed spent fuel storage services under its customer agreements and completing its licensing/regulatory obligations under its license, thus fully implementing LC-5. See id. at 8-9.

In its response, the staff also assessed the PFS motion as it attempts to address the State's objections to the MSA and indicated it agrees with the views expressed by PFS on each of those matters. Regarding the purported need to make the MSA inviolable by incorporating its provisions as license conditions, the staff declared that while the Commission in CLI-00-13 made clear the importance of the wording of the sample service agreement provisions, it also indicated that each contract did not have to incorporate the same wording "slavishly." The staff further noted that although the Commission could have ordered such incorporation, it instead referred to the existing staff materials license decommissioning financial assurance guidance that sets forth sample contract language, indicating a clear intent that license incorporation of the MSA was not required and establishing that this State argument is meritless. See id. at 10-11.

Addressing next the State's assertion that the incorporation of MSA provisions that were not part of the record previously before the Board renders its prior summary disposition ruling in LBP-00-6 wholly inoperative so as to require vacation, the staff declared that a determination to set aside summary disposition would require that any differences be shown to be relevant and probative to the issues upon which summary disposition was granted. As to the State's specific claim that change from using member contributions, i.e., cash in hand, as the source of construction funding to PFS reliance on debt financing constituted a material change, the staff

noted that in its response to the earlier PFS dispositive motion it indicated such financing was an acceptable means of satisfying LC-1 and that it had declared it considers a contractual obligation would fulfill the license condition requirement that funding be "fully committed" before construction begins. Further, the staff found without substance the State's concerns that PFS will never have significant cash reserves or liquid assets relative to its liabilities, will have very little cash flow, and will not have on hand a previously identified sum of **xxxxxxxxxxxx** before any SNF was shipped. According to the staff, the State's concerns about cash reserves and cash flow are without merit given the MSA provisions that require its customers to pay all facility operating and maintenance costs, while the State's **xxxxxxxxxxxx** figure, as PFS asserted in its motion, misrepresents the now-superseded PFS plans, which would have required customer payments for each canister to be received prior to shipment of that canister. See id. at 11-13.

As to other asserted MSA deficiencies, the staff did not agree with the State's concerns about the ambiguity and complexity of certain MSA terms. With regard to the term "aggregate usage," the staff declared it unambiguous, noting that the State's sole interpretation correctly defined it, and asserted that the State's concern ultimately is irrelevant because in refining the MSA PFS has substituted the term "reserved capacity" that comports with the State's definition. Nor did the staff agree with the State that the definition of "term" is complicated given the definition of "aggregate usage," but again finds this concern irrelevant given the definition of "reserved capacity" that has been incorporated into the revised MSA. And as to the State arguments about the long term payment impacts of customers that withdraw their SNF from the facility and leave the nuclear industry, the staff found this wholly speculative in light of the MSA creditworthiness assessment/financial assurance provisions so as not to provide a basis for denying summary disposition. See id. at 14-16.

With regard to the various State claims about the inadequacy of the MSA provisions permitting **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**, the staff indicated it agreed with PFS that the State has not explained the significance of the **xxxxxxxx xxxxxxxxxxxxxxxxxxx**; that the MSA makes clear that, until new commitments for replacement capacity are obtained, **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**; and that PFS has leverage because partial payment is required prior to the receipt of a customer's SNF. Additionally, the staff found insubstantial the State's concerns about the adequacy of the **xxx**/KgU amount of the loan in that such an amount would generate **xxxxxxxxxxxx** dollars in loans to cover **xxxxxxxxxxxx** dollars in construction costs and the revised MSA provides for an adjustment in the event construction is delayed. See id. at 16-17.

Also insubstantial, according to the staff, are the State's related arguments about the inadequacy of the MSA provisions regarding **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxx**. Although noting the State questions the adequacy of the MSA **xxxx** provisions as they base repayment on "reserved capacity," which the State asserted depends on knowing the unknowable fact of how long the Skull Valley facility will operate, the staff declared that "reserved capacity," which reflects the total MTU to be shipped by that customer and is the basis for its principal repayment obligation regardless of actual usage, does not depend on knowing the facility operating term. Moreover, with regard to the State's assertion that cost recovery based on a forty-year facility life will under-recover principal if the facility only operates for twenty years, the staff maintained that even if the facility only operates for twenty years, the MSA requires that **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx the MSA contains a mechanism for recovering unforseen deficiencies during each operational year, and **xxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**. As to the State's concern that linking **xxxxxxxxxxxxxx** to fuel delivery years will create an operating deficiency in some years, in addition to the declaration of Mr. Parkyn in support of the PFS motion indicating that PFS will accumulate sufficient funds **xxxxxxxxxxxxxxxxxxxxxxxxxxx**, the staff noted that the revised MSA addresses this argument adequately both by creating a formula whereby **xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxx**. Finally, the staff maintained the State's assertions that the MSA does not apportion costs when construction costs are not fixed at **xxxxxxxxxxxx** and does not allow a determination of revenue shortfall are insubstantial in that, as PFS notes, the provisions of the MSA make it clear that customer payment obligations are based on the amount of PFS indebtedness, not a fixed amount of **xxxxxxxxxxxx**. See id. at 17-19.

The staff also addressed four State creditworthiness concerns. Responding to the State's claim that the MSA is deficient because it has an indeterminate term and no cost of services estimate, besides indicating it agreed with the PFS arguments that cost of services have been adequately addressed at the June 2000 evidentiary hearing and the planned facility life clearly is forty years, the staff maintained that the State failed to explain why it is important for ensuring that the MSA creditworthiness provisions are adequate for the MSA to include a

cap or estimation of services costs or specify the duration of the facility's term. Also not compelling, notes the staff, is the State's concern that because many customers may close and decommission their facilities after shipping SNF to PFS, the MSA provisions requiring customer take-back will not be effective to ensure payments. According to the staff, this claim is adequately addressed in the MSA provision that requires a customer that suspends or discontinues business to put in place financial assurances to cover amounts necessary to remove its SNF from the PFS facility. Also lacking an adequate explanation as to its impact on creditworthiness in light of the MSA's financial information disclosure and financial assurance provisions, according to the staff, are the State's concerns that PFS customers will include various entities, including rate regulated utilities, nuclear fuel leasing companies, or nuclear asset management companies, and that a customer approaching insolvency will attempt to mask its financial condition. Nor was the staff persuaded by the State's argument that the staff will need to constantly monitor the financial condition of PFS customers, indicating that under the applicable license conditions, the responsibility for making the annual creditworthiness evaluation would rest with PFS. See id. at 19-22.

Although recognizing the Commission's concern in CLI-00-13 that the staff not be involved in making complex post-licensing legal and factual determinations relative to any license conditions, the staff also labeled as insubstantial the State's assertions that the staff is called upon to make such judgments under the revised MSA. The staff agreed with PFS that the State's concern that (i) the timing and extent of construction was unknown is belied by the project scope, schedule, and cost estimate information provided by PFS; (ii) costs of service and the MSA term are open-ended is meritless given that the revenue inflow is not speculative and PFS may rely upon operating revenues; (iii) financial assurance can come only from a

speculative inflow of customers willing to sign the MSA is itself speculative; and (iv) staff may materially change the MSA is groundless given its responsibility to follow established regulatory provisions. See id. at 22-23.

Finally, the staff was unwilling to accede to the State's argument that each of the PFS member utilities must be named as a co-licensee because they are de facto licensees. In addition to being beyond the scope of contention Utah E and the Commission's remand, the staff noted that the State, despite citations to various MSA provisions, has not demonstrated that PFS is a shell over which its members exercise true control. Indeed, the staff declared, the State has ignored various MSA conditions that make it clear PFS is, in fact, in control of the facility. See id. at 23-24.

4. State Reply to Staff Summary Disposition Response

In a January 5, 2001 reply to the staff's response, with the observation that the staff's response basically mirrored the PFS motion, the State nonetheless made several comments regarding the staff's filing. See [State] Reply to the NRC Staff's Response to "[PFS] Motion for Summary Disposition on Issues Remanded by CLI-00-13 on Utah Contention E and Confederated Tribes Contention F and Response to [State] Objections to the Adequacy of [PFS MSA] to Meet Part 72 Financial Assurance Requirements" (Jan. 5, 2001) [hereinafter State Dispositive Motion Reply]. According to the State, the staff failed to recognize the problems inherent with the "evolving" nature of the PFS MSA, which has and could still be changed substantially. Moreover, even under the revised MSA, there are still significant problems, such as the anomalies created when PFS changed from "aggregate usage" to "reserved capacity" as its cost allocation methodology. In the State's estimation, the staff's inability to recognize the effects of these significant changes calls into serious question its ability to recognize when it is

acting beyond the Commission's directive in CLI-00-13 that its post-hearing review must be ministerial. See id. at 2-3.

In its reply, the State also challenged the staff's position that the substantive provisions of the MSA need not be incorporated into the license as conditions. The staff's position that the Commission's approach in CLI-00-13 in not requiring such license conditions is dispositive, the State declared, ignores the fact that at that time the Commission had no way of knowing that PFS would radically change its construction financing and O&M cost recovery schemes nor did it have before it the substantive concerns about those matters (and others) that the State has now raised. Also, the State declared, contrary to the staff's suggestion, it is asking only that substantive MSA provisions be incorporated to provide the necessary reliability and finality to PFS financial assurance commitments. See id. at 3-5.

With regard to its concerns about PFS use of debt-financing of construction costs, the State argued that the staff's earlier endorsements of such financing were in the context of **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**. Indeed, the State asserted, the staff seems to have changed its mind regarding the prudence of such an arrangement, given the staff's response to an earlier admission request in which it stated:

> "PFS could have 100% debt financing[;] however, in practice the Staff would not expect this to occur, since 100% debt financing would create a large debt burden which is unlikely to be assumed under prudent business practices absent other compelling circumstances."

Id. at 6 (quoting NRC Staff's Objections and Responses to the "[State] Fourth Set of Discovery Requests Directed to the NRC Staff (Utah Contention E)" (Jan. 28, 2000) at 10). Additionally, according to the State, the PFS scheme is contrary to what the Commission was willing to

permit in its decision in Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 309 (1997) in which the Commission by license condition did not allow more than seventy percent debt financing of construction costs. Nor is the staff correct, according to the State, that there has been no showing of a clear need for having **xxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** Finally, the State challenged the staff's argument that the State has not substantiated its claim that **xxx**/KgU is insufficient to cover construction costs, asserting that regardless of whether this figure would generate **xxxxxxxxxxxx** to cover **xxxxxxxxxxxx** in estimated costs, the MSA provision governing the conditions on customer loans does not require customers to loan PFS the actual costs of construction, thereby creating the possibility it will not have construction funding. See id. at 5-7.

With regard to the staff's arguments in connection with the MSA's creditworthiness provisions, the State first noted that at the June 2000 evidentiary hearing, **xxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**. The State then explained that, notwithstanding the staff's argument that there is no explanation of why the State asserts the MSA must include a cost cap or cost estimation for creditworthiness checks to be effective, for such a credit check to be useful, the scope of potential debt must be known. So too, the State

declared, the staff's similar argument regarding the State's creditworthiness-related claim that the MSA needs to specify a term of duration indicates the staff's lack of appreciation of the significant uncertainties that face PFS over the forty-year (or longer) term during which PFS must rely on MSA terms and conditions to generate all operating revenue in a rapidly changing industry in which PFS members, such as Southern California Edison, face bankruptcy and other market vicissitudes. Also, according to the State, equally troubling, and providing further support for including substantive MSA provisions as license conditions, is the staff's argument that post-licensing, the staff will not monitor or otherwise review the financial conditions and finances of PFS customers, thereby creating a situation that improperly leaves the public in the hands of PFS to ensure its customers' creditworthiness to provide PFS needed revenues in a turbulent energy market. Finally, the State expressed its disagreement with the staff's assertion that staff review of customer finances is not an issue within the scope of contention Utah E. Paragraph nine of that contention raises concerns about the financial assurance impact of a customer breaching a service agreement, becoming insolvent, or otherwise not making payments, which are concerns the State declared PFS has attempted to address through creditworthiness checks, the implementation of which must be subject to post-license reviews by the staff. See id. at 8-10.

Also unrebutted by the staff, the State maintained, is the State's assertion that the concerns it raises about the PFS financial plan will require the staff to make complex legal and factual judgments to assess PFS compliance with 10 C.F.R. § 72.22(e). Given the overly optimistic nature of the evolving PFS plan, which provides no cash reserves, creates the possibility of construction loans in amounts inadequate to fully fund actual construction costs, and depends on speculative customer inflow and operating revenues, the result can only be a

post-license staff review mired in the types of complex determinations in which the Commission in CLI-00-13 has indicated the staff should not be involved. See id. at 10-11.

E. PFS Motion to Strike/State Responsive Filing

1. PFS Motion to Strike

Also on January 5, 2001, PFS submitted a motion seeking to strike portions of the State's December 22, 2000 dispositive motion response. See [PFS] Motion to Strike Portions of [State] Response to [PFS] Motion for Summary Disposition on Issues Remanded by CLI-00-13 on Utah Contention E/Confederated Tribes Contention F (Jan. 5, 2001) [hereinafter PFS Motion to Strike]. Such action is appropriate, according to PFS, for those matters that either should have been raised when the State filed its objections to the PFS MSA or are outside the scope of the Board's jurisdiction pursuant to the Commission's remand in CLI-00-13. In this regard, PFS asserted that the scope of the Commission's remand was limited to a determination of whether the MSA meets all financial assurance license conditions and is adequate to address the concerns raised in contention Utah E. Further, PFS maintained that the Commission's remand defining how objections to the MSA were to be raised and adjudicated contemplated that following State objections to the MSA, PFS would be entitled to demonstrate it was entitled to summary disposition in connection with those concerns, thus precluding the State from introducing new objections in its response to that motion when PFS would have no opportunity to address those concerns and demonstrate to the Board they precluded summary disposition. See id. at 4-6.

PFS claimed that seven matters fall into one or both of these categories and so should be stricken as a basis for the State's response. The first is the State's claim that the MSA does not contain provisions that create adequate cash reserves or provide adequate construction

and O&M funding over the life of the proposed Skull Valley facility. According to PFS, this argument is outside the scope of the remanded proceeding in that it directly challenges the sufficiency of Commission-approved LC-1 and LC-2, given that neither requires a cash reserve, but calls for construction funding to be "fully committed" prior to construction and "prices" to be sufficient to cover facility costs. See id. at 6-7.

Also meriting exclusion is the State's summary disposition response argument (and the accompanying portion of its statement of material facts in dispute), not raised in its objections, **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxx**. According to PFS, although the State did challenge the sufficiency of the MSA's creditworthiness provisions to identify customers with financial difficulties and address any resulting funding shortfall through financial assurance mechanisms, it did not claim a deficiency because the MSA failed to provide that a customer's default could be recouped **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**. See id. at 7.

PFS declared exclusion is appropriate as well for the State's argument that the MSA creates a cost payment deficiency by providing that a customer, upon removal of its SNF from the PFS facility, is obligated to make service costs payments for such fuel only for the remainder of the storage period specified in the customer's storage schedule. According to PFS, although the State claims this deficiency arose when PFS changed the cost allocation basis from "aggregate usage" to "reserved capacity," in fact this argument was equally applicable under the "aggregate usage" cost allocation basis and so should have been raised in the State's objections to the MSA. In addition, PFS noted it now has changed the MSA to require expressly that a customer removing SNF from the PFS facility remains obligated to pay

its proportional share of the PFS service costs through the end of the service agreement term, which runs until PFS license termination. See id. at 8.

Purported MSA ambiguity regarding whether or how PFS will recoup its multimillion dollar capital investment in developing and using a dry cask transfer system is the fourth issue PFS asserted should be stricken from the State's response (and the corresponding portions of its statement of material facts in dispute) given that the State did not even mention the dry cask storage system in its objections. Also to be stricken (along with the corresponding portions of its statement of material facts in dispute) are State issues regarding the party responsible for SNF canister and cask costs and for transportation costs. PFS declared this appropriate because the State's concerns about **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxx**. See id. at 9.

Finally, PFS sought to have expelled the State's argument (and the corresponding portions of its statement of material facts in dispute) regarding uncertainty about Price-Anderson Act liability coverage for SNF received from another Part 72 facility. According to PFS, this matter is outside the scope of the Commission's remand, having been addressed and dismissed by the Board in its summary disposition ruling and not having been the subject of any Commission discussion, and was not raised in the State's objections. See id. at 9-10.

2. State Motion to Strike Response

In a January 16, 2001 response, the State asserted that the PFS motion to strike is without merit in all respects. See [State] Response to [PFS] Motion to Strike Portions of [State] Response to [PFS] Motion for Summary Disposition on Issues Remanded by CLI-00-13 on Utah Contention E/Confederated Tribes Contention F (Jan. 16, 2001) [hereinafter State Motion to

Strike Response]. Initially, the State asserts that a major premise of the motion is incorrect in that the Commission remand is not as circumscribed as PFS asserts. According to the State, the issue before the Commission in CLI-00-13 was whether the Commission's Claiborne "license conditions" approach under 10 C.F.R. Part 70 could be extended to a Part 72 ISFSI applicant like PFS. Thus, the Commission did not approve LC-1 and LC-2, but merely affirmed the Board's LBP-00-6 decision insofar as it approved the use of license conditions as part of the PFS financial assurance showing and remanded to the Board with a directive that PFS produce a sample service agreement meeting all financial assurance license conditions and that the State be afforded an opportunity to address the adequacy of the service agreement to meet its contention Utah E concerns. The motion to strike, the State declared, is an attempt by PFS to constrain the State from exercising the opportunity afforded by the Commission to address MSA adequacy to meet the State's contention Utah E concerns, an exercise that is all the more prejudicial to the State given the prior refusal of PFS to produce any MSA-related discovery documents. Certainly, the State declared, if in response to the Commission's remand, PFS decides to make substantive changes to the financial plan it previously has proffered to the Commission, the Board, and the parties, then the State must be given an opportunity to dispute that funding scheme, including the implementability of LC-1 and LC-2. See id. at 3-4.

The State also contended that, as a procedural matter, the PFS motion is misplaced. According to the State, a motion to strike is not to address the merits of a pleading as a reply would, but is to confine itself to the procedural sufficiency of the filing and any accompanying affidavits. In this instance, however, there were no procedural defects in the State's pleading given that the State addressed PFS MSA changes made after its objections or raised matters within the scope of the Commission's remand. Further, given that the State has had no

opportunity for discovery relating the MSA and so is forced to make its case based on the document itself, to permit PFS to use the procedural posture of this case to keep the State from raising relevant and material concerns amounts to an improper lessening of the PFS summary disposition burden. See id. at 5-6.

Turning to the specific points made by PFS in support of its motion to strike, in connection with the third issue proffered by PFS the State asserted that, contrary to the PFS claim that the State's argument regarding the lack of a mechanism to pass through service costs if a customer withdraws SNF before the end of the MSA term could have been made regardless of the MSA revision from "aggregate usage" to "reserved capacity," this problem as well as the second PFS issue of passing costs in instances when PFS is unable to collect all invoiced costs from customers arose because of PFS drafting changes that were provided to the other parties and the Board on December 4, nearly a month after the November 7 State objections. Alternatively, the State declared, PFS is attempting to use its motion as a vehicle for improperly making substantive reply arguments, as is evidenced by its statement advising the Board that PFS intends to change the MSA to expressly require that a customer that removes SNF from the facility will remain obligated to pay its proportional share of PFS service costs relative to such fuel through the end of the service agreement term, i.e., when the PFS license is terminated. See id. at 7-8.

So too, in addressing PFS issues four through seven, the State declared that these were raised in whole or in part in response to PFS drafting changes. In this regard, the State noted that the black-line version of the revised MSA attached to the PFS dispositive motion shows changes to the Schedule 4 list of cost components, including those relating to cask and canister costs and transportation costs. Additionally, according to the State, Schedule 4 is

silent concerning PFS return on dry transfer system capital investment and nuclear insurance coverage of shipments from a Part 72 facility. Again, the State asserted it would be inequitable to permit PFS to make drafting changes but not allow the State to comment on the effect of those changes. See id. at 9.

Finally, the State addressed the first PFS assertion that the State's arguments regarding the lack of cash reserves and sufficient construction and O&M funding under the MSA are outside of the scope of the proceeding. According to the State, these are arguments that the State has raised consistently relative to contention Utah E so as to be within the bounds of the Commission's remand and thus not subject to being stricken. Further, the issue of cash reserves highlights the shortcomings of the MSA in the current volatile power industry environment in which disruptions and bankruptcy are extant and should be considered in the context of evaluating the PFS dispositive motion. See id. at 9-10.

II. ANALYSIS

A. PFS Summary Disposition Motion/Motion to Strike

The chronology of the parties filings would suggest that the State's reopening motion be considered first. It is apparent, however, that a number of the concerns raised in support of that motion overlap with the matters at issue relative to the PFS dispositive motion. In this regard it has been noted that

> to justify the granting of a motion to reopen the moving papers must be strong enough, in light of any opposing filings, to avoid summary disposition. Thus, even though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that

> the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding.

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973) (footnote omitted). Given this parallel between summary disposition and reopening, we believe it is appropriate to look to the resolution of those issues, along with the others involved in the summary disposition motion and the related motion to strike, before considering the State's reopening motion.

1. Summary Disposition and Motion to Strike Standards

In numerous other instances in this proceeding, we have described the standard governing summary disposition as follows:

> Under 10 C.F.R. § 2.749(a), (d), summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

LBP-02-20, 56 NRC 169, 180 (2002). We again use these standards in evaluating the PFS dispositive motion regarding the sufficiency of its MSA relative to contention Utah E. Further, with regard to the PFS motion to strike, such a motion is an appropriate mechanism for seeking the removal of information from a pleading or other submission that is "irrelevant," Power

Authority of the State of New York (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488, 514 (2001), or, in the context of summary disposition, portions of a filing or affidavit that contain technical arguments based on questionable competence, see Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 305 (1985).

2. PFS Dispositive Motion

a. Scope of Remand/Sufficiency of Previous Summary Disposition Decision

Given that the matters now before the Board arose as a direct response to the Commission's August 2000 determination relative to the Board's referral of its March 2000 summary disposition ruling, we think it important to address initially the parties' related legal disputes regarding (i) the scope of that Commission remand; and (ii) the continued efficacy of that Licensing Board summary disposition determination relative to portions of contention Utah E.

In considering the first matter, we note that the Commission in CLI-00-13 made clear that in relying upon PFS service agreement language commitments in granting summary disposition in favor of PFS, the Board's shortcoming was in going "too far in putting evaluation of the legal effectiveness of service agreements into the hands of the NRC Staff without itself reviewing a sample service contract." See CLI-00-13, 52 NRC at 35. Further, to correct this deficiency the Board was to direct PFS to produce "a sample service contract that meets all financial assurance license conditions," including those specified in that Commission decision, and provide the State with an opportunity to address "the adequacy of the service contract to meet the concerns raised in Contention [Utah] E," with the caveat that PFS would be entitled to summary disposition relative to any State objections the Board determined were insubstantial.

Id. While the Commission's directions to the Board thus are clear, in resolving this matter, we nonetheless think it important to remember the context within which the Board made the initial summary disposition ruling that was the subject of this Commission review.

In LBP-00-6, the Board found that as to the ten paragraphs or subparts of contention Utah E, the two then-existing staff proposed license conditions and/or four stated PFS service agreement element commitments addressed sufficiently the substance of those State concerns such that summary disposition in favor of PFS was appropriate in whole or in part in on nine of those subparts, with the remaining cost estimate/onsite liability insurance matters subject to consideration at the June 2000 evidentiary hearing. In this light, and bearing in mind the Commission's directions as to what is before the Board for resolution vis a vis the MSA, we find of paramount interest in this remand the question of whether the PFS-provided sample service agreement adequately implements what are now the six non-onsite liability insurance Commission-directed license conditions so as to address adequately the nine contention Utah E subparts that were the subject of the Board's March 2000 dispositive motion ruling.

Having said this, it is apparent we do not accept the State's assertion that simply by reason of the changes introduced by PFS in the MSA, as compared to its previous representations regarding service agreement content, there is no basis upon which to proceed to summary disposition in this instance. To be sure, the extensive nature of some of the changes to the PFS financial qualifications scheme, which were proffered less than six months after the Board (or less than two months in the case of the Commission) had placed significant reliance on those terms was unexpected, to say the least. Nonetheless, to say those changes render the Board's decision a nullity that should be vacated is too sweeping. Rather, there

having been no change in contention Utah E that was the focus of that decision,[7] as we discuss below, in our estimation what the Commission's remand requires is that we revisit the matters at issue in that contention in light of what are now the changed circumstances arising from the PFS MSA.

b. Adequacy of PFS MSA to Implement the Commission's License Conditions Relative to Contention Utah E

In its summary disposition motion, PFS attempts to establish, relative to each of the six non-onsite liability insurance license conditions, that its MSA implements that condition in a way that is adequate to address any implicated contention Utah E concerns so as to warrant a ruling in its favor, a position the staff supports and the State opposes. We likewise consider each of the six, albeit in the context of the particular contention Utah E concerns it implicates.

i. Subpart 1 -- Adequacy of PFS Ownership Information. In our initial summary disposition ruling, the Board found that this portion of the contention, which raised concerns about the ability or willingness of the original PFS members to fund construction, was amenable to summary disposition in favor of PFS because LC-1 would not allow facility construction to move forward unless sufficient funds, including equity contributions from PFS members, had been committed to the project. See LBP-00-6, 51 NRC at 119. There is now a dispute about the nature of sufficient funding given the MSA provisions that utilize **xxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** as the basic source of construction funding, which we discuss in more detail in section II.A.2.b.ii below.

[7] Although the Board required that PFS outline what the changes the MSA made to any previous PFS financial qualifications representations to the Board and the other parties and subsequently provided an opportunity for the submission of late-filed contentions relative to the MSA, the State chose to rest on its existing contention, which remains the issue statement before us.

Nonetheless, with respect to this subpart the fact remains that, as was previously the case, inadequate funding in whatever form will preclude construction from going forward.

In connection with the MSA, however, as was noted in section I.C.1 above, the State now argues relative to the PFS member-customers that it is apparent the business model the MSA fosters, which includes MSA provisions that make member-customers liable for SNF sent to the facility (sections 11.1, 11.2, and 20.1); make them the owners of their storage casks and canisters (section 11.2); require them to add PFS to their insurance polices as an insured (section 17.1.1(c)); accept the PFS liability cap on insurance on the amount of insurance it will carry (section 20.3); and fund all PFS services (section 13.4), is one that establishes a principal-agent relationship between PFS and its member-customers. By creating a shell designed to obfuscate the fact that these entities have responsibility and control over PFS, the State declares that, in accord with the Appeal Board's Marble Hill precedent, Public Serv. Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 198-202 (1978), the MSA establishes that PFS member-customers are required to be made co-applicants on the PFS license.

We cannot agree with this legal interpretation. Putting aside the not-inconsequential PFS and staff objections that this claim is beyond the scope of contention Utah E, see PFS Dispositive Motion at 23; Staff Dispositive Motion Response at 24, as well as the fact that the logical extension of the State's position (at least based on the MSA provisions cited) would be to make all PFS customers (members or otherwise) co-applicants, we find the Marble Hill precedent inapposite, given that the entities involved there were co-owners of the facility, which the PFS members here clearly are not. See Revised MSA § 11.4 (PFS has facility title at all times). More to the point are the Commission's endorsements of the limited liability corporation

as a stand-alone applicant/licensee in a number of recent reactor operating license transfer cases, including one in which the limited liability corporation also would hold an ISFSI license, which implicitly (if not explicitly) resolves this matter. See, e.g., Northern States Power Co. (Monticello Nuclear Generating Plant), CLI-00-14, 52 NRC 37, 57 (2000).

Thus, in connection with contention Utah E, subpart one, we find nothing in the State's objections relative to the MSA that creates a material factual dispute or otherwise precludes a ruling that summary disposition in favor of PFS on this subpart is again appropriate.

ii. Subpart 2 -- Adequacy of PFS Financial Base. In our earlier summary disposition ruling, we noted this contention Utah E subpart centers on claims about the adequacy of the PFS financial base to support construction and operation and the potential for facility termination prior to license expiration. See LBP-00-6, 51 NRC at 121.
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Regarding the PFS use of loans for construction funding, as was noted earlier, it is the State's position that the PFS plan, as reflected in its revised MSA, **xxxxxxxxxxxxxxxxxxxxxx** is inappropriate because **xxxxxxxxxxxxxxxxxxx** and, given the current financial instability and volatility in the energy markets, PFS is unlikely to be able to obtain funds from other sources; **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**; and PFS has no leverage to collect unpaid debts. Additionally, the State questions whether the **xxxxxxxxxxxxxxxxxxxxxx**

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx is adequate to cover any increased costs if there is a delay in Phase I construction if costs rise beyond the MSA Schedule 5 escalators and apparent lack of any escalators for Phases II and III. For the reasons set forth below, we find each of these objections insubstantial.

Regarding the general State challenge to the use of **xxxxxxxxxxxxxx** as the basis for financing construction as expressed in its reopening motion and its summary disposition responses, nothing in the Commission's jurisprudence or anything cited by the State prohibits such a financing arrangement or suggests a preference for the type of member equity funding/customer prepayment scheme that PFS indicated initially that it intended to utilize. **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**[8] Relative to the seemingly related concerns about the **xxxxxxxxxxxxxxxxxxxxxx** and the energy market volatility and instability, aside from the point that an "[a]pplicant cannot be required to prove that uncertain future events could never happen," Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 27 (2001), both turn on the unsupported assumption that one or more of the PFS members or customers, which by all indications would be entities subject to NRC

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[8] **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** See State Dispositive Motion Reply at 6.

financial assurance requirements, will inevitably fail to abide by the specific provisions of their service agreements regarding reimbursement to PFS, thus causing financial problems for PFS that it cannot address using the various MSA section 15 remedy mechanisms. Compare Northern States Power Co. (Monticello Nuclear Generating Plant), CLI-00-14, 52 NRC 37, 49-50 (2000) (cost pass-through contract with state-regulated utility adequate to establish financial qualifications).[9] By the same token, the availability of the MSA section 15 remedy mechanisms, along with the MSA provision (section 13.5.2) governing prior receipt of partial customer payments prior to PFS receipt of customer SNF, make it apparent that PFS has significant debt collection leverage. Finally, relative to the adequacy of the **xxxxxxxxxxxxxx xxxxxxx** in conjunction with any MSA Schedule 5 escalator factors in the event of a delay in Phase 1 construction, putting aside the fact that the amount to be collected under this figure exceeds Phase 1 construction cost estimates by some **xxxxxxxxxxxxxxxxxxxxxx**, the State has made no specific showing that the escalator factors used are inadequate or that other factors should have been employed, other than the blanket claim that anything less than stated

[9] Although the State has suggested that the complex structure of nuclear facility operating companies and their affiliates puts this matter in question, see State MSA Objections at 20, as PFS noted in its reply findings relating to the evidentiary presentations on contention Utah E/Confederated Tribes F, Financial Assurance, see [PFS] Reply to the Proposed Findings of Fact and Conclusions of Law of the [State] and the NRC Staff on Contentions Utah E/Confederated Tribes F, Utah R, and Utah S (Aug. 28, 2000) at 14 n.19, consistent with Monticello, the financial assurance required of PFS customers under MSA section 15 could be demonstrated by their status as electric utilities whose rate bases include costs to be paid to PFS. See also 62 Fed. Reg. 44,071, 44,077 (Aug. 19, 1997) (Commission policy statement on electric utility industry restructuring and economic deregulation noting that existing 10 C.F.R. Part 50 regulatory framework is sufficient to provide reasonable assurance of the financial qualifications of both electric utility and non-electric utility applicants and licensees). As it reviews the contents of the actual agreements negotiated by PFS with its customers, see CLI-00-13, 52 NRC at 35, customer financial assurance is an item we anticipate the staff would confirm.

customer responsibility for all construction costs leaves the potential for uncovered costs and so is inadequate. Similarly, the State's general claim that high levels of inflation and technology/regulatory-driven costs changes are not unknown so as to cause concern about the lack of denominated escalators for Phases II and III, Sheehan Declaration at 8, is insufficient to create a material factual dispute given the specific PFS showing that construction costs for these phases would need to escalate on the order of eighteen percent per year before exceeding the funds provided for under MSA section 13.2, see PFS Dispositive Motion at 19 n.40.

Regarding the efficacy of the MSA cost pass-through provisions, a matter also posited in the State's reopening motion and as part of the PFS motion to strike,[10] as our discussion above regarding **xxxxxxxxxxxxx** suggests, and as we have otherwise noted today in our decision regarding the efficacy of PFS construction and operational cost estimates relative to the Commission's financial qualifications requirements, see LBP-05-21, 62 NRC __, __ (May 27, 2003) (slip op. at 67), we see nothing fundamentally deficient with such an arrangement. To be sure, it may create a concern for PFS members/customers to the degree such an arrangement generates uncertainty about the costs and expenses associated with storing SNF at the facility, but those are matters they must assess in making a business decision whether to enter into the

[10] Although we deal with these and other reopening motion arguments in the context of the PFS summary disposition claim relative to contention Utah E, as we explain in section II.B below, our finding they are without substantive merit so as to require further adjudicatory consideration would be equally applicable to the State's reopening request.

MSA-defined contractual arrangement with PFS.[11] And, notwithstanding license issuance, under LC-1 and LC-2, it is whether enough customers are willing to accept such an arrangement that will control whether this facility will be built and operated. Moreover, to the degree the State has concerns about continued customer viability in the context of facility operation and the concomitant lack of a large PFS cash reserve to address this purported (albeit somewhat overstated) problem,[12] as we noted relative to the question of **xxxxxxxxxxxx xxxxxxxxxxx** above, general, undifferentiated concerns about the future viability of PFS customers are not adequate to establish a lack of compliance with the Part 72 financial assurance provisions, particularly when such concerns are expressed (1) relative to entities already subject to Part 50 financial qualifications requirements, see Monticello, CLI-00-14, 52 NRC at 51 (rate-regulated utilities presumed to have reasonable assurance of receiving sufficient revenue to fund safe operation of plants); and (2) in the face of MSA requirements for regular, **xxxxxxxxx** payments of all PFS estimated costs, **xxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxx,**[13] plus a requirement to pay accrued actual costs

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[11] **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** See PFS Dispositive Motion at 20 & n.42.

[12] As PFS notes, the State's concern in this regard was based largely on its misstatement that PFS would receive operational cost payments totaling some **xxxxxxxxxxxxx** for all the first 10,000 metric tons of spent fuel prior to shipment, when in fact it would receive only about one-eighth of that figure prior to receipt of the specific canisters. See PFS Dispositive Motion at 12-14.

[13] Although the PFS hearing testimony as to the amount of this contingency figure would, in our estimation, constitute a commitment that provides a floor for such a cost figure, see PFS Dispositive Motion at 16 n.34, there apparently is nothing in the MSA that would preclude PFS from increasing that amount as an additional vehicle for covering unanticipated

(continued...)

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. Thus, we find nothing in the “pass through” concept that is violative of the agency’s financial assurance regulations.

Finally, under this subpart, the State also raises a concern about the continued operation of PFS through license expiration. LC-5 now states that the PFS customer service agreements must include a provision that requires PFS not to terminate its license prior to furnishing the spent fuel storage services covered by the agreement. Yet, as PFS points out, MSA sections 23, 24.3.1, and 24.3.4 cover this requirement by (1) defining the “term” of the agreement as continuing until such time as PFS has completed its licensing or regulatory obligations under its license and the license is terminated or revoked; (2) prohibiting PFS from taking any voluntary action to terminate its existence during the agreement term; and (3) precluding PFS or a customer from terminating the agreement between the time facility operation begins and the end of the term.

The State thus having interposed no material factual issues or shown there is a substantial deficiency in the MSA in connection with this portion of contention Utah E, summary disposition on this subpart is appropriate as well.

iii. Subpart 3 -- Adequacy of PFS Funding Documentation, Including Business Plan and Subscription Agreements. In LBP-00-6, 51 NRC at 122-23, in granting summary disposition the Board found that the concerns reflected in this portion of the contention Utah E were addressed by then-proposed staff license conditions LC-1 and LC-2 and the fact that any facility

[13](...continued)
costs of whatever kind, including uncollected invoiced costs that the State claims raise a significant financial problem, see State Dispositive Motion Response at 13, and which PFS, in turn, maintains constitutes a newly-raised assertion that should be stricken, see PFS Motion to Strike at 7.

construction/operation cost aspects of this contention would be addressed in the June 2000 hearing on subpart six of the contention. Given the Commission's endorsement of those staff license conditions in CLI-00-13, 52 NRC at 36, and our separate decision today addressing the State's concerns about construction/operation cost estimates under subpart six, see LBP-05-21, 62 NRC at __ (slip op. at 58-101), we find that summary disposition regarding this subpart is once again appropriate.

iv. Subpart 4 -- Adequacy of PFS Documentation on Current Financial Status. The Board in LBP-00-6, 51 NRC at 124, found that this concern about whether "PFS will be permitted either to construct or operate the facility when there is an inadequate revenue stream to cover the costs reasonably involved in such activities" was addressed by what are now LC-1 and LC-2. While this remains true in the post-MSA context, there also are the various MSA provisions discussed with respect to subpart two above regarding construction loan adequacy and cost pass-through efficacy, all of which we find again provide an appropriate basis for summary disposition on this subpart.

v. Subpart 5 -- PFS Liability for Spent Fuel Casks. The Board's ruling in LBP-00-06, 51 NRC at 125-26, that summary disposition was appropriate for this contention subpart as it concerned the allocation of liability between PFS and its SNF customers was based on PFS commitments to (1) offer storage services only on the condition that each customer retain title to its fuel throughout the storage period; and (2) include in each customer agreement an assignment of legal and financial responsibility among customers, as SNF owners, and PFS. In CLI-00-13, 52 NRC at 36, the Commission made these commitments a license condition -- LC-3 -- that requires the PFS service agreement to include provisions addressing these matters. The MSA does so in several instances, including section 11.1, which mandates that

title to the SNF remain with the customer at all times; section 13.6, which makes a customer/owner responsible for any contamination clean-up costs it causes; section 24.4, which makes the customer/owner responsible for removing its SNF from the site at the end of the agreement term at its own expense; sections 17.1 and 17.2, which define the responsibilities of PFS to maintain nuclear and non-nuclear related insurance; and section 20, under which the PFS warranty limitations and limitation of liability are identified, including its liability for any and all claims under the MSA, other than section 5.2 liquidated damages for failure to timely provide PFS-supplied shipping and transfer casks and ancillary equipment, not to exceed the amount obtained by PFS under insurance policies for such claims.

Regarding these provisions, the State has claimed, albeit principally in the context of its reopening motion, that the section 5.2 liquidated damages clause, along with the provision in section 21 to cover force majeure (i.e., act of God) costs, do not adequately account for the costs involved while the section 17.1 provisions create a “monstrous labyrinth” of liability distribution between PFS and its customers that would allow insurers and insured to deny responsibility. With respect to the former claim, as PFS points out, to cover such costs (for which the State has not provided any specific estimates) it has both the **xxxxxxxx** per year contingency funding as well as the authority under MSA section 13.4 to pass such costs along to its SNF customers. And as to the supposed section 17.1 liability labyrinth, as was explained in the affidavit of PFS nuclear insurance expert Hanson Pickerl attached to the PFS reopening motion response, the Price-Anderson, nuclear worker insurance, nuclear property insurance, and supplier’s and transporter’s insurance policies that the customer owner and/or PFS are required to maintain have provisions defining the “insured” that are intended to allow “seamless transition of coverage from one insurance program to the next during the course of nuclear fuel

fabrication, use, shipment, and storage" and so avoid disputes among nuclear liability insurers about coverage. See PFS Reopening Response, Declaration of Hanson D. Pickerl at 2-5. Finally, as was noted in LBP-00-06, 51 NRC at 126, to the degree this contention subpart had implications for State claims relating to the adequacy of PFS offsite and onsite insurance coverage, our summary disposition finding relative to the former insurance was not disturbed by the Commission ruling in CLI-00-13 while the latter, in conformance with LC-7, is being dealt with today in our separate initial decision on contention Utah E, see LBP-05-21, 62 NRC at __ (slip op. at 96-101).

There thus being no material factual dispute relative to these matters, we find summary disposition in favor of PFS on this subpart of contention Utah E is again appropriate.

vi. Subpart 6 -- Inadequate Cost Estimates. As we indicated in LBP-00-06, 51 NRC at 108, PFS did not seek summary disposition regarding this contention subpart concerning the adequacy of PFS construction and operations cost estimates, which was the subject of the June 2000 evidentiary hearing and the initial decision that we issue today, see LBP-05-21, 62 NRC at __ (slip op. at 58-101). Nonetheless, a number of the MSA-related concerns interposed by the State relative to the PFS summary disposition motion arguably relate to this subpart and, as such, we deal with them in this context.

One of these items, also raised in the State's motion to reopen, concerns costs associated with return on equity and return on investment, items that purportedly were identified by PFS during the June 2000 hearing as not being operational costs but which are now covered as such costs under the MSA. Putting aside the fact that, regardless of how they were previously treated, under MSA section 13.4 they are pass-through costs that will be accounted for through collection along with other costs, the materiality of these costs as financial

assurance deficiencies is not apparent given that MSA section 13.2 provides **xxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxx**.

Another cost estimate item raised by the State is the question of dry transfer system cask costs, which is also the object of the PFS motion to strike. With respect to the State's question of whether dry transfer system costs are covered under the MSA, PFS has resolved that matter with a redraft of the definition of "Ancillary Equipment" under section 1. Regarding the related issue of whether the cost of the PFS capital investment in developing and using its dry cask transfer system should be included under the MSA, also a matter referenced in the State's motion to reopen, the Board today resolves that question in its initial decision regarding subpart six of contention Utah E, with its holding that such costs are considered pre-construction costs that need not be accounted for under the MSA, see LBP-05-21, 62 NRC at __ (slip op. at 77, 78-79), and so seemingly would be recoverable, if at all, as a return of investment under MSA Schedule 4.

Also raised as cost estimate concerns, and likewise subject to the PFS motion to strike, are purported MSA ambiguities regarding **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxx**. Although the State asserts these items create a financial qualifications deficiency of a possibly unknown amount of unrevealed liabilities for PFS and its customers, we find these concerns lack materiality. **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

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xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx It may well be that PFS and/or its customers will find cause to improve these MSA clauses to further outline which is the case; however, as this possible need for a refinement has been presented by the State, it does not create a financial qualifications deficiency that has any regulatory significance under Part 72.

Finally, in connection with the MSA, the State raises a concern about the viability of cost estimates given the failure of PFS to specify whether it will build the Low rail line or utilize an ITF as the method for getting SNF from the rail main line to its Skull Valley facility more than twenty miles away. A similar argument was posited in the context of the June 2000 evidentiary hearing and is disposed of today in favor of the PFS in our contention Utah E initial decision based on the fact that the estimated Low rail line costs envelop the ITF costs. See LBP-05-21, 62 NRC at __ (slip op. at 83-84). As such, that concern need not be considered further here.

Thus, to the degree the State has posited MSA-related cost estimate matters that are not dealt with in our initial decision today regarding contention Utah E,[14] we find there are no material factual issues in dispute and that summary disposition in favor of PFS on those matters in the context of this contention Utah E subpart is appropriate.

vii. Subpart 7 -- Adequacy of Existing Market Documentation. This contention Utah E subpart questions the need for PFS to document the adequacy of the existing SNF storage market through a showing of customer service agreement commitments sufficient to fund facility construction, operation, decommissioning, and contingencies. In LBP-00-6, 51 NRC

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[14] In this regard, although principally in the context of its reopening motion, the State also raises a cost estimate concern about the need to account for **xxxxxxxxxxxxx** costs as part of the operating and maintenance expenses of the facility, a matter we resolve today in the context of our decision on contention Utah E, see LBP-05-21, 62 NRC at __ (slip op. at 91).

at 127, we found that the PFS commitments requiring PFS to demonstrate sufficient committed funding for construction and service agreements with prices to cover operation, maintenance, and decommissioning costs over the entire license term rendered claimed concerns about market adequacy immaterial to the requisite section 72.22(e) reasonable assurance finding. Given that those PFS commitments now are embodied in Commission-endorsed license conditions LC-1 and LC-2, we again find summary disposition in favor of PFS appropriate relative to this contention Utah E subpart.

viii. Subpart 8 -- Propriety of PFS Use of Debt Financing. In LBP-00-6, 51 NRC at 128, we found that the debt amortization stream of revenue concern embodied in this contention Utah E subpart was resolved by the PFS commitments that now are the basis of LC-1 and LC-2. As we discussed in connection with subpart two above, however, **xxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxx**. As we also discussed in that section, we do not find the State's objections to that funding mechanism either create material factual disputes or evidence financial assurance inadequacies. Accordingly, we again grant summary disposition in favor of PFS on this subpart of contention Utah E.

ix. Subpart 9 -- Adequacy of PFS Measures to Address Service Agreement Breach. Relative to this contention Utah E subpart concerning cost coverage for service agreement breaches, in LBP-00-6, 51 NRC at 130, the Board found the PFS commitment that its service agreements would require customers to "(1) periodically provide pertinent financial information; (2) meet creditworthiness requirements; and (3) provide any necessary additional financial assurances (e.g., an advance payment, irrevocable letters of credit, third-party guarantee, or payment and performance bond)" provided the requisite reasonable assurance such that

summary disposition in favor of PFS was appropriate on this subpart. In CLI-00-13, those commitments were incorporated by the Commission into license condition LC-4, which in turn was addressed by PFS in MSA section 15, which among other things permits PFS to seek additional financial assurances if there has been any "material adverse change" in a customer's financial situation, and MSA Schedule 3.[15] The State, however, maintains that these measures are inadequate because they can only be employed once a financial problem has become apparent, at which time it is too late to utilize the various section 15 remedial tools. Moreover, the State declares, the potential remedy of returning the SNF to its owner is unsatisfactory if the customer is in bankruptcy, which could place the fuel under the control of a bankruptcy court and, if the situation is serious enough, cause the customer to lose its license to possess the fuel. Putting aside the fact this claim seems to suggest that LC-4 was deficient at its inception because that license condition declares financial assurance prepayment mechanisms, such as letters of credit, guarantees, and bonds, should be utilized only "where necessary," rather than ab initio for all PFS customers as the State now suggests, see Sheehan Declaration at 10, this concern also is wanting as once again it is based on the notion rejected by the Commission in the financial qualifications area that the possibility of uncertain financial events the applicant

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[15] Also in the State-posited circumstance in which a PFS customer leaves the nuclear industry before the PFS license term is completed, see State MSA Objections at 15, these same financial assurance mechanisms would be applicable to address any concern about that customer's willingness to abide by its MSA financial commitments through the end of the MSA term, i.e., PFS license termination, see PFS Dispositive Motion at 17-18. Moreover, although the staff is not responsible per se for monitoring the financial conditions of each PFS customer, see Staff Dispositive Motion Response at 22, nonetheless by virtue of its SNF proprietorship each customer that undertakes this long-term storage commitment is subject to the responsibilities imposed by NRC regulations and staff oversight of its regulated activities, including any change in its proprietary interest such as the State-postulated situation in which Department of Energy ownership of fuel stored at the PFS facility becomes an issue, see State MSA Objections at 15 n.20.

cannot prove could never happen must be fully accommodated. See Millstone, CLI-01-3, 53 NRC at 27. As before, we find that there are no material factual issues in dispute and that summary disposition in favor of PFS on this subpart is appropriate.

x. Subpart 10 -- Adequacy of PFS Resources for Non-Routine Expenses. In connection with this contention Utah E subpart concerning a variety of non-routine expense matters, as was noted previously, the Board in LBP-00-6, 51 NRC at 131-33, found summary disposition appropriate as to this issue statement except as it raised questions about the adequacy of onsite liability insurance, a matter that the State raises again in its reopening motion and that we, in accordance with LC-7, resolve today in our initial decision regarding contention Utah E, see LBP-05-21, 62 NRC at __ (slip op. at 96-101). Relative to the MSA, the State seeks to raise again one matter that we addressed in the making this ruling: its concern about the availability of Price-Anderson Act coverage relative to spent fuel transfers between two Part 72 ISFSI facilities. Citing MSA section 12 that states service agreement rights and obligations may be assigned to 10 C.F.R. Part 50, 70, or 72 licensees that meet creditworthiness requirements, the State now asserts this shows PFS itself contemplates potential shipments between Part 72 licensees. Putting aside the PFS request to strike this matter as previously determined in LBP-00-6, 51 NRC at 132, this section in fact provides no support for the State's claim and, as such, affords no basis for the Board to revise its prior summary disposition ruling in favor of PFS on this matter.

c. Other Claims Regarding MSA Efficacy

In addition to the foregoing claims that appear to relate to specific portions of contention Utah E, the State interposes several other objections to the PFS MSA that PFS asserts are subject to summary disposition in its favor. First, the State declares that the terms of the MSA

are not sufficiently inviolate to satisfy the Commission's CLI-00-13 directive that key provisions of the service agreement be sufficient to guide subsequent staff review of individual contracts. In this regard, the State maintains that the MSA clearly does not fulfill this Commission mandate. According to the State, PFS declarations of the illustrative nature of the MSA and its reservation of the power to negotiate future individual service agreements with alternative provisions providing comparable reasonable assurance are inconsistent with this Commission directive. As a consequence, the State maintains, PFS should be required to identify those MSA provisions that are inviolate and, after considering party comments on MSA provision inviolability and sufficiency generally, any provisions found to merit this label, with appropriate revisions, should be incorporated into the PFS license. See State MSA Objections at 5-7.

In describing its expectations regarding the sufficiency of MSA provisions as a basis for post-licensing staff reviews of actual service agreement contracts negotiated by PFS, the Commission analogized this to the existing post-licensing review scheme for material licensees under which staff Regulatory Guide 3.66, Standard Format and Content of Financial Assurance Mechanisms Required for Decommissioning Under 10 CFR Parts 30, 40, 70, and 72, provides sample contract language for financial assurance documents. See CLI-00-13, 52 NRC at 35 n.6. In this instance, the Commission indicated that a Board-sanctioned MSA would provide the requisite staff review guidance as the staff seeks to ensure subsequent negotiated service agreement contracts meet the Commission's expectations as reflected in the seven Commission-adopted license conditions. See id. Incorporating all (or even substantial portions) of the MSA into the PFS license clearly would not be consistent with this Commission-endorsed guidance-based approach.

In this regard, however, the State further suggests that the MSA is deficient as a guidance mechanism because the overall financial scheme the MSA creates is ambiguous in significant aspects, requires the staff to make judgments that are overly complex, and allows the staff too much discretion in its sufficiency review of individual agreements. This is a matter of concern here because, as the Commission indicated in CLI-00-13, 52 NRC at 34, the focus of the staff's post-licensing review process is verification that the Board-approved design is being adhered to. Nonetheless, the State's general complaint about ambiguity and the related complex and discretionary nature of staff reviews is not borne out by the few specific examples it provides.[16]

In addition to its claims regarding the uncertainty that accrues to the PFS loan and cost pass-through mechanisms for funding facility construction and operation, which we have addressed previously, the State asserts that the initial MSA use in section 13.4 of the concept of "aggregate usage," i.e., the ratio between an individual customer's aggregate usage (calculated by taking the sum for all years of the customer's SNF storage term of the number of MTU the customer will store during each year of that term, per the customer's MSA storage schedule) and all customers' aggregate usage, to determine a customer's proportional share of PFS service costs created significant ambiguity for the PFS cost recovery scheme. Although asserting this is not the case, PFS thereafter revised the MSA to allocate service costs using a ratio based upon "reserved capacity," i.e., the total quantity of fuel a customer commits to store

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[16] In this regard, the State also seeks to leverage what it considers staff failures to recognize the problems with the "evolving" nature of the MSA into a basis for questioning the staff's ability to recognize the bounds of its authority to engage in post-hearing review of adjudicatory matters, an argument we find inharmonious with the recognized proposition that the adequacy of the staff's safety review is not relevant to the issue of whether a license application should be approved. See Curators of the Univ. of Missouri (TRUMP-S Project), CLI-95-1, 41 NRC 71, 121 (1995).

at the facility during the term of the customer's service agreement, thereby addressing a State concern about uncertainty over customer storage terms. Also, in the context of its motion to strike, PFS advised the Board that it was revising MSA section 13.4 to require that a customer removing fuel from the facility would remain obligated to pay its proportional service costs share for that fuel through the end of the service agreement (i.e., PFS license termination), thereby addressing a State concern that a failure to change some of the language of this section with the "reserved capacity" revision had created the possibility that PFS would be responsible for abandoned capacity costs if customer fuel departs before the end of the service agreement term. The State, however, continues to express a concern about the "reserved capacity" approach **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** based on the **xxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** and as illustrating the ambiguity problem given the several MSA revisions that were involved. We, however, find neither of these concerns persuasive to negate the adequacy of the MSA under the agency's financial qualifications requirements or to foreclose the entry of summary disposition in favor of PFS, the former being another aspect of the cost pass-through scheme that we previously have found is not inconsistent with the agency's financial qualification requirements, see section II.A.2.b.ii above, while the latter (which resolves the problem identified by the State) is indicative of the first-of-a-kind nature of the PFS facility rather than any fundamental defect in the applicant's financial qualifications efforts.

Finally, the State identifies as an MSA deficiency the fact that the staff in its post-hearing verification review will need to make factual and legal judgments that will entail discretionary determinations and complex analyses of the type the Commission warned against in CLI-00-13, because the MSA does not prescribe what is to be built and when, or the extent of

PFS service costs or the MSA's term, and relies upon a speculative inflow of customers to establish the requisite financial assurance. Relative to the State's concerns about indiscriminate project planning and costing leading to an improper staff verification review process, as set forth in our initial decision today regarding contention Utah E, see LBP-05-21, 62 NRC at __ (slip op. at 84, 94-95), we find that PFS has provided the information necessary to show it has fulfilled its financial assurance responsibilities in this regard. Moreover, as we have noted in section II.A.2.b.ii above, the MSA mechanisms for funding facility construction and operation comply with the agency's financial assurance requirements. And to the degree those provisions create questions about the extent to which PFS will be able to find customers willing to contract with it for SNF storage services under the MSA, LC-1 and LC-2 make it clear that PFS bears the risk that its funding design will leave it unable to attract a sufficient number of customers and so be unable to receive authorization to construct and/or operate the facility. Also, as to the State's raised concern about the supposed indeterminate scope and length of the facility's operational term, whether this is for the two twenty-year periods of an initial license that would entail the receipt and storage of 4000 SNF casks or something somewhat less, as the staff has pointed out, using the "reserved capacity" concept for proportioning costs, the fuel storage space reserved by the customer, not the length of the facility operation, is the compelling factor.[17]

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[17] Recently, in the form of a motion for reconsideration of its decision in LBP-03-04, 57 NRC __ (Mar. 10, 2003), regarding State concerns over the probability of military aircraft accidents in connection with the Skull Valley facility, PFS has put before the separate Licensing Board chaired by Administrative Judge Farrar the possibility of authorizing initial construction and operation of a significantly smaller, 336-cask facility. Currently, the license application before this Board outlines plans for a very differently sized facility, and it is upon the basis of that application that we make our ruling today.

Thus, as to these additional State concerns, we find no disputed material factual issues are involved and, further, that summary disposition in favor of PFS is appropriate as to these matters as well.

3. PFS Motion to Strike

As was noted in section I.E.1, in its January 2001 motion to strike, PFS requested that the Board exclude certain portions of the State's dispositive motion response and associated pleadings, essentially on the basis that it had failed to raise the claims in question as part of its previous MSA objections or reopening motion or, in one case, because the matter was previously ruled on and was not implicated by the Commission's remand. As we have noted above, we have dealt with each of the State's concerns implicated by the motion to strike in the course of our substantive discussion regarding the PFS dispositive motion and found those matters wanting as a basis for further proceedings. As such, we need not deal with the substance of the PFS motion, and thus deny it as moot.

B. State Motion to Reopen

There remains for our consideration the State's motion to reopen the closed evidentiary record relative to contention Utah E.[18] In this instance, although PFS and the staff have made various assertions regarding the State's compliance with the several requirements set forth in section 2.734,[19] we think one or the other of two matters is dispositive of the State's motion.

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[18] At the end of the June 2000 hearings, the Board closed the evidentiary record regarding the issues considered during those sessions, subject to any transcript corrections. See Tr. at 2683.

[19] The standard for granting reopening is set forth in 10 C.F.R. § 2.734, which states in pertinent part:

> (a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria

(continued...)

First, as both PFS and the staff noted and as our separate initial decision today regarding contention Utah E makes clear, see LBP-05-21, 62 NRC at __ (slip op. at 66, 92), the scope and focus of the June 2000 hearings on contention Utah E concerned the issues of the adequacy of PFS cost estimates relating to construction and operating expenses under contention Utah E, subpart six, and onsite property insurance coverage under contention Utah E, subparts five and ten, not the how and why of the funding mechanisms PFS now proposes to use in its MSA to cover those cost items. As such, other than to the extent they relate to these limited "cost estimate" and onsite property insurance coverages issues, the State's claims provide no basis for reopening the record.

Additionally, under the Commission's reopening standard, the fact that newly proffered evidence relied upon as the basis for reopening is different from that set forth during the

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[19](...continued)

> are satisfied:
>
> (1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
>
> (2) The motion must address a significant safety or environmental issue.
>
> (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.
>
> (b) The motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards set forth in § 2.743(c). Each of the criteria must be separately addressed, with a specific explanation of why it has been met. Where multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

hearing is, in and of itself, not enough. Instead, in an instance when an initial decision has not yet issued, the proponent bears a heavy burden to show, among other things, that had the evidence been considered, a materially different result, i.e., a different outcome, would likely have obtained. See Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). In this instance, we are unable to conclude that such would be the case. As to those bases for the State's motion that we discuss in connection with section II.A.2 above, reopening is inappropriate for the reasons discussed therein in which we find, in essence, that these MSA-related concerns clearly would not have the requisite material effect on the outcome of the hearing. Moreover, as to the one reopening issue that is not discussed in that context -- PFS utilization of the **xxxxxxxx** customer fee -- although it apparently falls outside the scope of the June 2000 hearing, it also lacks any substance given the PFS indication that nothing in MSA section 13 indicates those costs are to be returned or rebated to the customer, a statement we accept as a binding commitment not to make such a rebate. See PFS Reopening Motion Response at 18 n.38.

Accordingly, the State having failed to demonstrate that any of the items it proffered in support of its reopening request either fall within the scope of that evidentiary hearing or would have led to a materially different result, we deny its reopening request as well.

III. CONCLUSION

Acting in accordance with the Commission's directive in CLI-00-13, 52 NRC at 35, that (1) PFS be provided the opportunity to produce an MSA that meets the seven financial assurance license conditions adopted by the Commission; (2) intervenors be given an opportunity to address the adequacy of the MSA to meet the concerns raised in contention

Utah E; and (3) PFS be afforded to submit a dispositive motion relative to any intervenor objections that the Board was to assess, granting summary disposition relative to those that are insubstantial and providing an evidentiary hearing on the contention as to any others, the Board has assessed the MSA submitted by PFS and the State's objections thereto in light of the December 4, 2000 PFS summary disposition motion, the January 5, 2001 PFS motion to strike portions of the December 22, 2000 State's response to that motion, and the November 7, 2002 State motion to reopen the record of the June 2000 evidentiary hearing regarding contention Utah E. With regard to the State's objections to the PFS MSA, the Board has concluded that the PFS motion for summary disposition should be granted as to all subparts of contention Utah E. Further, the Board denies (1) the PFS motion to strike as being moot; and (2) the State's motion to reopen as based on matters falling outside the scope of the evidentiary hearing record it seeks to reopen and/or as failing to demonstrate that had the information it now proffers been considered, a materially different result, i.e., a different outcome, would likely have obtained in the hearing.

For the foregoing reasons, it is this twenty-seventh day of May 2003, ORDERED, that:

1. The December 4, 2000 PFS motion for summary disposition regarding contention Utah E/Confederated Tribes F is granted as set forth in section II.A.2 above;

2. The January 5, 2001 PFS motion to strike portions of the State response to the December 4, 2000 PFS motion for summary disposition is denied for the reasons set forth in section II.A.3 above;

3. The November 7, 2000 State motion to reopen the June 2000 evidentiary record regarding contention Utah E is denied for the reasons set forth in section II.B above; and

4. Given previous party positions suggesting that financial assurance-related information may include proprietary or other sensitive data, on or before Friday, June 20, 2003, the State, PFS, and the staff shall provide the Board with a joint filing outlining each (1) proposed redaction of any part of this memorandum and order to which there is no objection; and (2) proposed redaction of any part of this memorandum and order to which there is an objection. The particular word or phrase to be withheld from public release shall be specified for each proposed redaction; blanket requests for withholding are disfavored. Further, in accordance with 10 C.F.R. § 2.790, the party seeking the proposed redaction shall at the same time provide a separate submission that describes with specificity (as supported by any

necessary affidavits) the reasons for withholding each proposed redaction. Responses by any party objecting to a proposed redaction shall be filed on or before Monday, June 30, 2003.

THE ATOMIC SAFETY
AND LICENSING BOARD[20]

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Dr. Peter Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

May 27, 2003

[20] Pursuant to previous Board issuances on e-mail service of documents identified as potentially containing proprietary information, copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for PFS, the State, and the staff. In addition, this date a memorandum was sent by e-mail to all the parties to this proceeding advising them of the issuance of this decision and the Board's determination to afford this decision confidential treatment pending a response by PFS, the State, and the staff to the Board's inquiry under ordering paragraph four above. See Licensing Board Memorandum and Order (Notice Regarding Issuances Concerning Contentions Utah E/Confederated Tribes F and Contention Utah S) (May 27, 2003) (unpublished).

Although agreeing with the result reached here, because of illness Judge Kline was unavailable to participate in the final preparation of this decision.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
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 LBP-05-20-REDACTED VERSION OF LB MEMORANDUM AND ORDER (RULINGS ON SUMMARY DISPOSITION MOTION AND OTHER FILINGS RELATING TO REMAND FROM CLI-00-13) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of August 2005