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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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)	March 31, 2004

MEMORANDUM AND ORDER
(Disclosure/Redaction of Evidentiary and Decisional Materials
Relating to Contentions Utah E/Confederated Tribes F and Utah S;
Adopting Transcript Corrections Relating to
Contentions Utah E/Confederated Tribes F and Utah S)

Pending with the Licensing Board are (1) two separate requests by intervenor State of Utah (State) concerning the disclosure of hearing transcripts and evidentiary material relative to contention Utah E/Confederated Tribes F, Financial Assurance; and (2) filings submitted (at the request of the Board) by the State, applicant Private Fuel Storage, L.L.C., (PFS), and the NRC staff providing their differing views regarding the redaction of portions of the Board's four decisions regarding that financial assurance contention and a related issue statement, contention Utah S, Decommissioning. For the reasons set forth below, we redact in part and disclose in part portions of the evidentiary and decisional materials at issue as proprietary information, which are described in various appendices to this decision. In addition, as an appendix to this opinion, we adopt the parties' proposed transcript corrections for the June 2000 evidentiary sessions relating to financial assurance matters.

– PUBLICLY-AVAILABLE VERSION –

I. BACKGROUND

A. Evidentiary Materials

As a follow-on to previous State requests for the disclosure of nonpublic materials regarding the financial assurance contentions heard by the Board in the summer of 2000, see Tr. at 1410-19, 2681-82, in response to Board orders dated July 13, 2000, and September 8, 2000, PFS, the State, and the staff submitted a joint filing specifying which portions of the Utah E/Confederated Tribes F evidentiary record that the parties agreed and disagreed to withhold from public disclosure. See Licensing Board Order (Scheduling Matters) (July 13, 2000) (unpublished); Licensing Board Order (Granting Extension Request) (Sept. 8, 2000) (unpublished); Joint Filing of the Parties on Portions of the Hearing Transcripts, Pre-Filed Testimony, and Exhibits Concerning Utah E that Can Be Placed on the Public Record (Sept. 15, 2000) [hereinafter 9/15/00 Joint Filing]. In justifying its proposed redactions, PFS described the information at issue as "confidential commercial and financial information." Letter from Paul A. Gaukler, Counsel for PFS, to Emile L. Julian, Office of the Secretary of the Commission (Sept. 15, 2000) [hereinafter Gaukler Letter].

Although the parties reached agreement on the disclosure of many items in the evidentiary record, the State submitted a separate filing disputing some of the redactions proposed by PFS. See [State] Request to Disclose Evidentiary Material Relating to the Hearing on Contention Utah E/Confederated Tribes F and Request to Reply (Sept. 15, 2000) [hereinafter 9/15/00 State Request]; see also [State] Reply to [PFS] Response to [State] Request to Disclose Evidentiary Material Relating to the Hearing on Contention Utah E/Confederated Tribes F and Request to Reply (Oct. 11, 2000) [hereinafter 10/11/00 State Reply]. PFS and the staff submitted responsive filings. See [Staff] Response to [State]

Request to Disclose Evidentiary Material Relating to the Hearing on Contention Utah E/Confederated Tribes F and Request to Reply (Sept. 25, 2000) [hereinafter 9/25/00 Staff Response]; [PFS] Response to [State] Request to Disclose Evidentiary Material Relating to the Hearing on Contention Utah E/Confederated Tribes F and Request to Reply (Sept. 25, 2000) [hereinafter 9/25/00 PFS Response]; id. Declaration of John D. Parkyn Pursuant to 10 C.F.R. § 2.790 (Sept. 25, 2000) [hereinafter 9/25/00 Parkyn Decl.]; NRC Staff's Reply to "PFS Response to [State] Request to Disclose Evidentiary Material Relating to the Hearing on Contention Utah E/Confederated Tribes F and Request to Reply (Oct. 11, 2000) [hereinafter 10/11/00 Staff Reply]; [PFS] Surreply to the [State] Reply to [PFS] Response to [State] Request to Disclose Evidentiary Material Relating to the Hearing on Contention Utah E/Confederated Tribes F and Request to Reply (Oct. 18, 2000) [hereinafter 10/18/00 PFS Surreply].

B. Decisional Materials

Following our May 27, 2003 issuances relating to contention Utah E/Confederated Tribes F, Financial Assurance, and contention Utah S, Decommissioning,[1] the parties submitted a joint report indicating which portions of those three decisions and each party's cross-examination plans relative to the Contention Utah E/Confederated Tribes F evidentiary hearing could be placed on the public record. See Joint Filing of the Parties on Portions of Memorandum and Order (Rulings on Summary Disposition Motion and Other Filings Relating to Remand from CLI-00-13), Partial Initial Decision (Contention Utah E/Confederated Tribes F),

[1] See Licensing Board Memorandum and Order (Rulings on Summary Disposition Motion and Other Filings Relating to Remand from CLI-00-13 (May 27, 2003) (unpublished pending review of proprietary information); Partial Initial Decision (Contention Utah E/Confederated Tribes F, Financial Assurance) (May 27, 2003) (unpublished pending review of proprietary information); Partial Initial Decision (Contention Utah S, Decommissioning) (May 27, 2003) (unpublished pending review of proprietary information).

Partial Initial Decision (Contention Utah S), and Cross-Examination Plans Regarding Contention Utah E that Can Be Placed on the Public Record (July 3, 2003) [hereinafter 7/3/03 Joint Filing]. In a separate July 3, 2003 filing, PFS provided specific reasons for its proposed redactions.[2] See [PFS] Justification for Withholding Portions of Memorandum and Order (Rulings on Summary Disposition Motion and Other Filings Relating to Remand from CLI-00-13), Partial Initial Decision (Contention Utah E/Confederated Tribes F), Partial Initial Decision (Contention Utah S) from Public Disclosure (July 3, 2003) [hereinafter 7/3/03 PFS Justification]; id. Declaration of John D. Parkyn Pursuant to 10 C.F.R. § 2.790 (July 2, 2003) [hereinafter 7/2/03 Parkyn Decl.]. The State and the staff filed their oppositions to certain of the proposed redactions, to which PFS replied on July 24, 2003. See [State] Response to [PFS] Justification for Withholding Portions of Memorandum and Order (Rulings on Summary Disposition Motion and Other Filings Relating to Remand from CLI-00-13), Partial Initial Decision (Contention Utah E/Confederated Tribes F), Partial Initial Decision (Contention Utah S) from Public Disclosure (July 14, 2003) [hereinafter 7/14/03 State Response]; NRC Staff's Response to [PFS] Proposed Redactions Attached to the Parties' July 3, 2003 Joint Filing (July 14, 2003) [hereinafter 7/14/03 Staff Response]; [PFS] Reply to [State] Objections to Maintaining Confidentiality of Proprietary Information in Licensing Board's Financial Assurance and Decommissioning Decisions (July 24, 2003) [hereinafter 7/24/03 PFS Reply].

In January 2004, the Board ruled on a motion filed by PFS requesting clarification and/or reconsideration of the Board's May 27, 2003 contention Utah E/Confederated Tribes F partial initial decision and May 27, 2003 summary disposition ruling. See Licensing Board

[2] PFS did not propose any redactions from the parties' cross-examination plans. See 7/3/03 Joint Filing at 2.

Memorandum and Order (Granting in Part and Denying in Part Motion for Reconsideration and/or Clarification of Financial Qualifications Decisions) (Jan. 5, 2004) (unpublished pending review of proprietary information). As directed by the Board, the parties jointly identified the portions of the Board's January 5 ruling that could be placed on the public record. See Joint Filing of the Parties on Portions of Memorandum and Order (Granting in Part and Denying in Part Motion for Reconsideration and/or Clarification of Financial Qualifications Decisions) that Can Be Placed on the Public Record (Jan. 20, 2004) [hereinafter 1/20/04 Joint Filing]. To justify its proposed redactions, PFS relied upon the same reasons advanced in its July 3, 2003 filing. See 1/20/04 Joint Filing at 2. Once again, the State and the staff objected to certain of the proposed redactions. See [State] Objections to [PFS] Proposed Redactions to Board Memorandum and Order Ruling on Reconsideration of Its Financial Qualification Decisions (Jan. 30, 2004) [hereinafter 1/30/04 State Response]; NRC Staff's Response to [PFS] Proposed Redactions Submitted on January 20, 2004 (Jan. 30, 2004) [hereinafter 1/30/04 Staff Response].

II. DISCUSSION

A. Introduction

1. Evidentiary Materials

Relative to the evidentiary materials, albeit stating a preference for public release of the "entire record" on Contention Utah E/Confederated Tribes F, the State specifically seeks disclosure of matters falling within four discrete categories of information that are particularly "critical to the public interest": (1) the methodology and assumptions relied upon by PFS in calculating its cost estimates for the Private Fuel Storage facility (PFSF); (2) the bottom line

construction cost for each construction stage of the PFSF, as well as debt financing costs; (3) the designation of costs that will be treated as pass-through costs under the customer service agreements; and (4) the maximum level of onsite property insurance attainable by PFS at reasonable terms and costs. See 9/15/00 State Request at 2, 4-6. The State also argues that at the time PFS filed its September 15, 2003 initial request to withhold confidential information, PFS did not submit an accompanying statement of reasons -- in contravention of 10 C.F.R. § 2.790(b)(1) -- and chose instead to rely upon a May 15, 2000 Declaration of PFS Board Chairman John Parkyn, which the State asserts provided only generalities, rather than specific, compelling justifications for nondisclosure. See 10/11/00 State Reply at 4-5. Moreover, as to a supporting declaration from Mr. Parkyn that was later filed by PFS on September 25, 2000, the State challenges the purported existence of a viable competitor to PFS, and consequently, the existence of any threat of competitive harm to PFS. See id. at 6-9.

For its part, PFS characterizes the information it seeks to withhold from public disclosure as confidential or proprietary commercial or financial information.[3] See Gaukler Letter at 1; 9/25/00 PFS Response at 3; see also 9/25/00 Parkyn Decl. ¶ 2. PFS predicts that it will suffer substantial competitive harm from the disclosure of its proprietary information to competitors (including the proposed Owl Creek project), existing and potential customers, vendors, suppliers, and subcontractors. See 9/25/00 PFS Response at 3-7; see also 10/18/00 PFS Surreply at 6-7; 9/25/00 Parkyn Decl. ¶¶ 4-7, 9-11; Affidavit of John D. Parkyn Pursuant to 10 C.F.R. § 2.790 (May 15, 2000) at 2 [hereinafter 5/15/00 Parkyn Aff.]. While PFS has agreed

[3] PFS later withdrew some of its initial proposed redactions, specifically those relating to the expected capacity for all three phases of construction of the PFSF, except to the extent that the capacity is directly related to License Condition 1 (LC-1) (i.e., the minimum-sized initial facility for which funds must be acquired prior to starting construction). See 9/25/00 PFS Response at 4-5 & n.8.

to disclose the methodology by which it estimated the costs of the facility and the methodology by which it will demonstrate compliance with the financial license conditions, it maintains that information relating to contractual terms, costs and prices, and business judgments is "core confidential information" exempt from public release. 9/25/00 PFS Response at 8; see 10/18/00 PFS Surreply at 9 (PFS seeks to "protect specific monetary values, fuel quantities, and contract provisions").

Without offering its opinion relative to any of the specific disclosure disputes between PFS and the State, for its part, the staff does not challenge any of the proposed PFS redactions. See 9/25/00 Staff Response at 2; 10/11/00 Staff Reply at 1.

2. Decisional Materials

With respect to the Board's four decisions regarding contentions Utah E/Confederated Tribes F and Utah S, PFS requests several categories of information be withheld, including (1) bottom line and category-by-category construction and operation and maintenance (O&M) cost estimates; (2) the amount of property insurance PFS intends to maintain for its facility; (3) host payments to the Skull Valley Band of Goshute Indians (Skull Valley Band); (4) the minimum-sized facility for which PFS has committed to obtain funds before beginning construction pursuant to LC-1; (5) its intention to fund construction in part by **xxxxxxxxxxxxxxxxxxxxx xxxxxxx** and to pass all of its O&M costs directly through to its customers, including all Board references to and discussions of the Commission's decision in Northern States Power Co. (Monticello Nuclear Generating Plant), CLI-00-14, 52 NRC 37 (2000), in the context of pass-through costs; (6) specific terms of the PFS-customer model service agreement (MSA) (in addition to **xxxxxxxxxxxxxxxxxxxxxxxxxxxx** and O&M cost pass-throughs); and (7) the existence of and terms of its settlement agreement with Castle Rock Land and Live Stock, L.C.,

Skull Valley Company, Ltd., and Ensign Ranches of Utah, L.C. (collectively Castle Rock). See 7/3/03 PFS Justification at 3-9; 7/2/03 Parkyn Decl. ¶¶ 4-7; 1/20/04 Joint Filing at 2 n.4 (adopting same arguments as set forth in 7/3/03 PFS Justification). According to PFS, the disclosure of commercially sensitive information falling into these categories to potential competitors, vendors, and customers would result in substantial competitive harm. See 7/3/03 PFS Justification at 2.

In its responses to the PFS redaction requests, the State asserts that all four of the Board's financial qualifications decisions should be released in their entirety. See 7/14/03 State Response at 4; 1/30/04 State Response at 2. In its more recent filings, the State maintains, as it did in its 2000 filings, that PFS has provided little or no justification for its claim that it will suffer substantial competitive harm given that there are no current or potential competitors to PFS. See 7/14/03 State Response at 5-6; 1/30/04 State Response at 7. In addition, the State objects to the PFS claim of confidentiality for information relating to certain construction and O&M costs, storage capacity, and Tooele County host payments that either have been publicly disclosed by PFS or are already in the public domain. See 7/14/03 State Response at 7-10; 1/30/04 State Response at 5-6. Further, in challenging the PFS attempt to redact the Board's references to and discussions of the Commission's Monticello decision, the State argues that the confidentiality provisions of section 2.790 do not apply because the information at issue originated with the Board, rather than with PFS, and because such redactions would be antithetical to the legal tenets of precedent and stare decisis. See 7/14/03 State Response at 9-12; 1/30/04 State Response at 4-5. Although the State did not challenge any proposed redactions from the evidentiary materials of PFS estimates for specific cost categories (as opposed to bottom line construction and O&M costs) or of the specific terms of the PFS model

service agreement (MSA), see 9/15/00 State Request at 5-6, it now seeks disclosure of information found in the Board's decisions relating to Skull Valley Band host payments, Castle Rock settlement **xxxxxxxx**, and other MSA terms, see 7/14/03 State Response at 13-14.[4]

While the staff does not oppose any of the evidentiary material redactions proposed by PFS, it does contest certain proposed redactions from the Board's decisions. In particular, the staff objects to any redactions of discussions relating to the Monticello decision and of certain construction and O&M cost estimates that were made publicly available by PFS. See 7/14/03 Staff Response at 2-9; 1/30/04 Staff Response at 1-2.

B. Legal Standard for Disclosure

1. NRC Regulations and Case Law

Generally speaking, NRC regulations favor the disclosure of final NRC records and documents for public inspection.[5] See 10 C.F.R. § 2.790(a). As an exception to the general rule, however, privileged or confidential commercial or financial information is protected from public disclosure. See id. § 2.790(a)(4). Parties requesting the withholding of such information are required to provide an application for nondisclosure, in addition to an affidavit listing the proprietary information and an accompanying explanation. See id. § 2.790(b)(1). The

[4] In addition to its substantive objections to the requested redactions, the State asserts that the Board should reject any proposed redactions from the Board's January 5, 2004 reconsideration/clarification ruling on procedural grounds because PFS failed to provide a recent affidavit justifying its request to withhold confidential information. See 1/30/04 State Response at 4.

[5] Recently, a significant revision to the agency's 10 C.F.R. Part 2 rules of practice and procedure became effective, under which the provisions of section 2.790 were moved to a new section 2.390. Although the new rule does not apply to this proceeding, as the statement of considerations accompanying the rule indicates, the new section does not embody any substantive or editorial changes relative to section 2.790. See 69 Fed. Reg. 2182, 2219 (Jan. 14, 2004) (Table 2).

application and affidavit must be provided "at the time of filing the information sought to be withheld." Id. § 2.790(b)(1)(ii)

NRC regulations also set forth a two-part test to be used by the Commission in determining whether to withhold commercial or financial information from public disclosure. First, the Commission must ascertain whether the information "is a trade secret or confidential or privileged commercial or financial information." Id. § 2.790(b)(3). In reaching this initial determination, the Commission is to consider five factors:

> (I) Whether the information has been held in confidence by its owner;
> (ii) Whether the information is of a type customarily held in confidence by its owner and whether there is a rational basis therefor;
> (iii) Whether the information was transmitted to and received by the Commission in confidence;
> (iv) Whether the information is available in public sources;
> (v) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. § 2.790(b)(4)(i)-(v). If the Commission finds that the information sought to be withheld is confidential or privileged commercial or financial information, then it must determine secondly "(i) whether the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position and (ii) whether the information should be withheld from public disclosure pursuant to this paragraph." Id. § 2.790(b)(5).

2. Prong 1: Confidential or Privileged Commercial or Financial Information

At the outset, we note that the State does not dispute that the information PFS seeks to withhold from disclosure is commercial or financial in nature. Rather, the State focuses its challenges on the first (whether PFS has held the information in confidence), fourth (whether the information is publicly available), and fifth (whether disclosure will cause substantial competitive harm to PFS) section 2.790(b)(4) factors. With regard to the fifth factor, the State disputes the existence of any actual competition to PFS. See 10/11/00 State Response at 5-7; 7/14/03 State Response at 4-6. Because here the first and fourth factors call for essentially pure factual determinations that we will address in further detail below, see sections II.D.1.a and b, we discuss in more detail here the fifth factor, which requires our interpretation of the concept of "substantial competitive harm."

Because there is little NRC case law that addresses the application of the section 2.790(b) two-prong test, as have other Licensing Boards, we look to the federal courts for guidance.[6] See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-8, 27 NRC 293, 299 (1988); Consumers Power Co. (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117, 120-21 (1980). In this regard, relative to the first prong, the courts have declared that to assess a claim of substantial competitive harm, a court "need not conduct a sophisticated economic analysis of the likely effects of disclosure." Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (citing National Parks &

[6] Section 2.790(a)'s exemption for confidential financial or commercial information has its genesis in, and thus parallels, the language of exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-8, 27 NRC 293, 299 (1988). In light of the FOIA's general assumption of disclosure, federal courts construe FOIA exemption 4 "narrowly." Washington Post Co. v. United States Dep't of Health and Human Servs., 865 F.2d 320, 324 (D.C. Cir. 1989).

Conservation Ass'n v. Kleppe, 547 F.2d 673, 681 (D.C. Cir. 1976)). Nonetheless, the courts also have declared that in supporting its claim, a party cannot successfully base its request to withhold upon "[c]onclusory and generalized allegations of substantial competitive harm." Id. Instead, substantial competitive harm must be shown by "specific factual or evidentiary material." Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 399 (5th Cir. 1985) (citing Pacific Architects & Engineers, Inc. v. Renegotiation Bd., 505 F.2d 383, 385 (D.C. Cir. 1974)). The party seeking nondisclosure is not, however, required to demonstrate "[a]ctual competitive harm;" rather, it need show only "[a]ctual competition and the likelihood of substantial competitive injury." Public Citizen, 704 F.2d at 1291 (quoting Gulf & Western Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979)).

Although the Public Citizen court noted that the concept of competitive injury was limited to harm resulting from the use of proprietary information by competitors, see id. at 1291 n.30, other courts of appeals have recognized that competitive harm can flow from the use of proprietary information by a party's customers or suppliers, see Continental Oil Co. v. FPC, 519 F.2d 31, 35 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976); see also Utah v. United States Dep't of the Interior, 256 F.3d 967, 971 (10th Cir. 2001).

3. Prong 2: Balancing the Interests

While the NRC exemption for confidential or privileged commercial or financial information under the first section 2.790(b) prong parallels the language of FOIA exemption 4, unlike the second section 2.790(b) prong, there is no language under the FOIA that calls for a balancing of the public's interest against the private competitive interest.[7] Although, as we

[7] Not all the federal courts of appeals have addressed the appropriateness of a balancing test similar to that set forth in section 2.790(b)(5). Compare Washington Post Co., (continued...)

noted above, NRC case law is rather scant on this issue, a Licensing Board previously examined the opposing interests at play in considerable detail in Wisconsin Elec. Power Co., (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-42, 15 NRC 1307 (1982). The Point Beach Board observed that a company's right to protect legitimate proprietary information is of great importance. See id. at 1329. A company must not only be confident that it can freely share such proprietary information with the Commission, but it also must not be deterred from developing safety improvements because of the possibility that competitors will be able freely to take advantage of the fruits of its labors. See id. On the other hand, the Board recognized the important right of the public to know the basis of the NRC's decisions -- a right grounded in fundamental principles of democratic government. Such openness, the Board suggested, is needed if the public is to have confidence in both the government and the nuclear industry. See id.

With this guidance in mind, we turn to the specific categories of information in dispute and the arguments advanced by the parties.

[7](...continued)
865 F.2d at 326-28 (recognizing balancing test under FOIA exemption 4) with Utah, 256 F.3d at 971 (acknowledging District of Columbia Circuit's use of balancing test but declining to address appropriateness of such a test for the Tenth Circuit).

C. Proposed Redactions to Evidentiary Materials[8]

1. Application of Prong 1: Confidential Commercial or Financial Information

a. Minimum-Sized Initial Facility

PFS first requests redaction of information relating to LC-1, the minimum-sized initial facility required for the commencement of construction of the facility. See 9/25/00 Parkyn Decl. ¶ 4. Although PFS does not object to the planned Phase I capacity being made publicly available, PFS seeks to withhold the fact that **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxx**. See id. PFS claims that non-member customers could use such information to their advantage in contract negotiations with PFS. See id. PFS further contends that the LC-1 information would give an advantage to PFS competitors in their

[8] At our request, the parties here submitted several sets of filings first addressing proposed redactions from the evidentiary materials and later addressing those from the decisional materials. Although the disclosure disputes arising among the parties involve information found in both the evidentiary and decisional materials, we consider the soundest approach is to rule on these disputes compartmentally (i.e., as they were raised by the parties in their evidentiary or decisional material filings).

Also at the outset, regarding the State's claim regarding the sufficiency of the information provided in support of the initial September 15, 2000 PFS redaction request, see section II.A.1 above, we recognize there clearly were difficulties with PFS facially meeting the filing requirements specified in section 2.790(b)(1) when, at the time it submitted its initial proposed redactions on September 15, 2000, it chose simply to rely upon its May 15, 2000 affidavit filed in conjunction with its pre-filed testimony and exhibits regarding the admitted financial qualifications contentions. In this instance, however, PFS initial reliance on a supporting affidavit of questionable relevance is not fatal to its redaction request. Although the initially submitted affidavit detailing the reasons for withholding information, which is to include an explanation of the nature and degree of the potential harm from disclosure, usually will provide the "entire basis" for granting or rejecting a party's proposed redactions, thereby avoiding the need for supplemental affidavits and testimony, this is not an absolute. Point Beach, LBP-82-42, 15 NRC at 1335 ("For the most part, the taking of supplemental affidavits or testimony and provision for submitting briefs should not be necessary." (emphasis added)). Given the apparent importance of this information to PFS, see id., and the submission within ten days of an additional Parkyn Declaration that sought to address fully the bases for redaction, the Board in this instance will include PFS supplemental filings in its consideration of the merits of the PFS redaction claims.

contract negotiations with potential customers. As a result, according to PFS, it could be precluded from obtaining the level of funding necessary for the start of construction of the PFSF. See id.

The State asserts that disclosure of information relating to LC-1 is necessary to inform the public of the magnitude of the PFS project. See 9/15/00 State Request at 5. According to the State, the minimum size of the PFSF is one of the critical elements of the PFS financial assurance demonstration and is different from the "break even" capacity for the facility. 10/11/00 State Reply at 8.[9] Additionally, as we noted above in section II.A.1, the State makes an overarching claim that PFS has no viable competitors so that no competitive harm can occur to PFS by disclosure of the information.

The State's claims about the importance of the disclosure of the information are, in fact, arguments that go to the second, interest balancing portion of the section 2.790 analysis, and we address it there. Of significance under prong one, however, is the State's concern that PFS lacks any competition, an assertion that, if true, would seriously undermine all of the PFS claims that its information is entitled to protection as proprietary.

In addressing this State assertion, we note that in separate litigation before the United States Court of Appeals for the Tenth Circuit in connection with the PFS license application, the State sought FOIA disclosure of the terms of the PFSF lease agreement between PFS and the Skull Valley Band. See Utah, 256 F.3d at 968-69. PFS claimed that disclosure of the lease terms would result in substantial injury to its competitive position.[10] See id. at 969-70. In

[9] As we noted above, see section II.A.1 supra, the staff did not object to any of the PFS proposed redactions from the evidentiary materials.

[10] The Skull Valley Band also claimed that its competitive position would be similarly (continued...)

support of its argument that the lease terms were protected information under FOIA exemption 4, PFS provided the court with an affidavit from John Parkyn, in which Mr. Parkyn declared that the business of storing spent nuclear fuel was a competitive one and that two competitors had announced the development of facilities that would compete with the PFSF. See id. at 970. Mr. Parkyn also asserted that if the lease terms were disclosed, "'suppliers, contractors, labor organizations, creditors, and customers of PFS and the facility would . . . be given an unfair advantage in negotiations with PFS.'" Id. (quoting Supp. App. at 202 (Parkyn Affidavit)). In addition, if the deal with the Skull Valley Band were to fall through, Mr. Parkyn declared in his affidavit, the ability of PFS to negotiate with another host would be substantially undermined if the terms of the current agreement were released. See id. Despite State arguments that denied the existence of actual competition, the Tenth Circuit affirmed the lower court's ruling in favor of PFS and the other defendants. See id. at 971. Specifically, the court held that the affidavit of Mr. Parkyn (along with that of Skull Valley Band Chairman Leon Bear) was "legally sufficient to demonstrate that actual competition exists and that disclosure would lead to substantial competitive injury." Id.

In connection with the instant proceeding before the Board, PFS identified the Wyoming-based Owl Creek Project as a major potential competitor. See 9/25/00 Parkyn Decl. ¶ 6. Notwithstanding the State's arguments (1) citing Wyoming law as a significant obstacle to the Owl Creek Project, see 10/11/00 State Reply at 5-6, and (2) identifying inconsistencies in Mr. Parkyn's affidavit and the PFS draft environmental impact statement, see id. at 7, we see no basis here to disregard the Tenth Circuit's finding regarding the existence of actual

[10](...continued)
harmed if the redacted lease information were made available to its competitors or potential partners. See Utah, 256 F.3d at 970.

competition.[11] Nor do we see a basis for disregarding the Tenth Circuit's acknowledgment that substantial competitive injury could result from information being released to PFS competitors and customers. Indeed, while the State has vigorously challenged the assertion that PFS has potential competitors in the business of storing spent nuclear fuel, it has not made any suggestion that, even in the presence of competition, PFS still would not suffer competitive injury if the information PFS seeks to protect regarding the minimum sized facility is disclosed. See generally 9/15/00 State Request; 10/11/00 State Reply.

Thus, because we find that actual competition exists and that disclosure of the minimum sized facility for purposes of satisfying LC-1 would lead to substantial competitive harm from potential competitors and customers, we conclude the LC-1 information is subject to protection as confidential or privileged commercial or financial information under the first prong of 10 C.F.R. § 2.790(b)(3).

b. "Bottom Line" Construction Cost Estimates

Although the State does not challenge the withholding of the specific breakdown of costs underlying PFS cost estimates, it does seek disclosure of the bottom line costs for all three phases of the PFSF, characterizing this information as being a critical part of the PFS financial demonstration. See 9/15/00 State Request at 5; 10/11/00 State Reply at 8-9. In addition, the State argues that debt financing costs must be disclosed as part of PFS O&M cost estimates. See 9/15/00 State Request at 4-5.

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[11] Although circumstances in the competitive environment of spent nuclear fuel storage may well have changed in the several years that have passed since the Tenth Circuit's ruling in Utah, PFS maintains to this date that the Owl Creek project remains a potential competitor. See 1/20/04 Joint Filing at 2 (adopting 7/3/03 PFS Justification and supporting affidavits); 7/2/03 Parkyn Aff. at ¶ 4 (readopting 5/15/00 Parkyn Aff. and 9/25/00 Parkyn Dec.). Moreover, in its more recent filings, PFS has identified two additional potential competitors -- the State of Utah itself and the Department of Energy. See 7/24/03 PFS Reply at 2.

PFS contends that disclosure of the bottom line costs of construction for each of the planned phases could cause PFS substantial competitive harm in that such information could be used against PFS in the competition for customers or the negotiation of contracts for services. See 9/25/00 Parkyn Decl. ¶ 5. In his September 25, 2000 declaration, Mr. Parkyn attested that competitors could use the PFS cost estimates to determine the feasibility of constructing an independent spent fuel storage installation (ISFSI) at a lower price and hence undercut the PFS prices for the storage of spent nuclear fuel. See id. Furthermore, according to Mr. Parkyn, disclosure would give potential non-member customers an advantage over PFS in negotiations over the price of storing spent fuel. See id. ¶ 7.

Consistent with the Tenth Circuit's holding in Utah and our reasoning above, see section II.C.1.a, we conclude that disclosure of the bottom line costs for each planned phase of construction would cause PFS substantial competitive harm from competitors and potential customers. Therefore, we conclude that information relative to the bottom line construction costs is confidential or privileged commercial or financial information under the first prong of 10 C.F.R. § 2.790(b)(3).

With respect to debt financing costs, PFS retention of the sale of debt securities as an option to secure the necessary construction funding was made publicly available in LBP-00-6, 51 NRC at 101, and in the PFS license application, see [PFS] License Application for [PFSF] at 1-4 to 1-6 (rev. 13). Accordingly, to the extent PFS requests the redaction of references to the general availability of debt financing, those proposed redactions are denied. However, to the extent the requested redactions concern the treatment of debt financing and the associated interest payments as pass-through costs, as discussed more fully below in section II.C.1.c, we view those proposed redactions as warranting confidential treatment.

c. Pass-Through Costs

The State contends that PFS employed a "hatchet approach" in its proposed redactions of "pass-through" costs (i.e., costs that are directly passed onto PFS customers), which the State asserts are part of the financial assurance demonstration. See 9/15/00 State Request at 5-6; 10/11/00 State Reply at 8. While the State acknowledges the PFS need to preserve the confidentiality of its proposed customer service agreements, it seeks to avoid a "broad-sweeping" redaction of pass-through cost information. 9/15/00 State Request at 6.

PFS, for its part, seeks only to redact the specific categories of costs that will be passed through to its customers, not the general premise that there will be some pass-through costs. See 9/25/00 Parkyn Decl. ¶ 9. PFS argues that if competitors, vendors, suppliers, and subcontractors knew that a particular category of costs were being passed through, they would be able to use that knowledge to the competitive disadvantage of PFS and its customers. See id. According to PFS, vendors, suppliers, and subcontractors will "not be as competitive in the pricing of their own goods or services" if they are aware of the relevant categories of pass-through costs. 9/25/00 PFS Response at 6-7. As an example, Mr. Parkyn predicts that rail carriers will increase their rates if they know that transportation costs are pass-through costs. See 9/25/00 Parkyn Decl. ¶ 9. PFS further asserts that competitors could use such information to anticipate how PFS intends to structure its customer service agreements and subsequently offer potential customers identical or more competitive terms. See id.

Because we find PFS will suffer substantial competitive harm if competitors, vendors, suppliers, and subcontractors learn which costs will be passed through to PFS customers, in keeping with the courts' findings regarding the scope of competitive harm in the Utah and

Continental Oil cases, we conclude that the specific categories of pass-through costs constitute confidential commercial or financial information within the meaning of section 2.790(b)(3)(i).

d. Level of Onsite Property Insurance

While the parties were able to reach agreement on redacting from the evidentiary materials the amount of the premium and the deductibles PFS will pay, disagreement remains between the State and PFS over disclosing (1) the total amount of on-site insurance coverage available to PFS; and (2) Mr. Parkyn's pre-filed testimony on onsite property insurance regarding the PFS response to future increases in the premium for onsite insurance coverage. See 9/15/00 State Request at 6-7.

PFS justifies redaction of the largest amount of onsite property insurance currently available to PFS at reasonable terms and costs based on the competitive disadvantage that would ensue from competitors using such information. See 9/25/00 PFS Response at 6; 9/25/00 Parkyn Decl. ¶ 10. In his September 25, 2000 declaration, Mr. Parkyn asserts that competitors could use information relative to the precise amount of insurance that PFS intends to maintain to either match or distinguish themselves from the PFS position in their negotiations with potential customers. See id.

Once again, guided by the Tenth Circuit's decision in Utah as the backdrop, we conclude PFS would suffer substantial competitive harm if its competitors had knowledge of the maximum amount of onsite property insurance available and the amount of insurance PFS intends to maintain so that this information qualifies as section 2.790(b)(3)(i) confidential financial or commercial information. With respect to the proposed redactions from Mr. Parkyn's pre-filed insurance testimony, notwithstanding the State's specific request to disclose information relative to the course of action PFS plans to take if its intended level of onsite

insurance coverage can no longer be maintained at an annual premium of **xxxxxxxx**, PFS did not expressly address the State's argument in any of its filings or supporting declarations. Because PFS has provided no basis for withholding this information, the Board cannot find that such information is confidential or privileged. Thus, we grant the State's request to disclose the relevant portions of Mr. Parkyn's pre-filed testimony.

2. Application of Prong 2: Balancing the Interests

To this point, we have concluded that the following evidentiary material information is confidential or privileged information under 10 C.F.R. § 2.790(b)(3)(i): (1) the minimum-sized initial facility; (2) bottom line construction costs; (3) the specific categories of pass-through costs; and (4) the maximum available amount of onsite property insurance and amount of onsite property insurance PFS intends to maintain. As we previously observed, the second step in the inquiry is to balance the public's right to be fully informed about the bases for and effects of licensing the PFSF against the demonstrated concern for protecting the PFS competitive position. In conducting this balancing test, we bear in mind the Point Beach Board's discussion of the principles underlying these competing interests. See LBP-82-42, 15 NRC at 1329. For the reasons below, we find that the risks of harm to PFS from disclosure outweigh the public's interest in disclosure.

The State argues for the public "to have some appreciation of the magnitude of the PFS proposal," information relative to the PFS bottom line costs and anticipated construction phases must be released. 9/15/00 State Request at 5. Moreover, the State contends that withholding the four categories of information PFS claims to be proprietary would show the public "only that which is favorable to one side, not the complete facts on which an informed person can reach

an opinion as to whether the judgment of the NRC is adequate to protect public health and safety." 10/11/00 State Reply at 10 (citing Point Beach, LBP-82-42, 15 NRC at 1325).

In the Board's estimation, however, the State's claim fails to give sufficient weight to the extensive amount of information that will be made available to the public, including the imposed license conditions and the remaining unredacted portions of the evidentiary record. PFS has agreed to disclose the capacity for each of the planned phases of construction, which gives the public a fairly precise idea of the magnitude of the proposed facility. In addition, the public record will include the general methodologies and assumptions PFS relied upon in determining its cost estimates. The redacted record thus will provide the public with sufficient, balanced information to know the basis for our decision.

Having already decided that the PFS competitive position would be detrimentally affected by disclosing the minimum initial size of the facility, the estimated bottom line construction costs, the specific categories of pass-through costs, and the amount of onsite property insurance PFS intends to obtain and maintain, our determination regarding the adequacy of the public evidentiary materials leads us to conclude that the risk of competitive harm to PFS outweighs any public interest in disclosure. We thus approve the PFS redaction requests with respect to the evidentiary materials, except to the extent that they encompass the portions of Mr. Parkyn's pre-filed testimony regarding the steps PFS will take if a **xxxxxxxx** annual premium will no longer cover the amount of onsite insurance it intends to maintain.

D. Proposed Redactions to Decisional Materials[12]

1. Application of Prong 1: Confidential Commercial or Financial Information

a. Minimum-Sized Initial Facility

Seeking redaction of references in the Board's four financial assurance-related decisions to the minimum initial size of the facility that it plans to construct, PFS relies on the same reasons given in Mr. Parkyn's September 25, 2000 Declaration, as discussed above in section II.C.1.a, to support its claim that such information is confidential and proprietary information. See 7/3/03 PFS Justification at 5-6 (citing 9/25/00 Parkyn Decl. ¶ 4).

In its responses, the State argues that the minimum initial capacity has already been publicly disclosed in the PFS Environmental Report (ER)[13] and the staff's Final Environmental Impact Statement (FEIS)[14] for the facility. See 7/14/03 State Response at 8-9; 1/30/04 State Response at 6. Moreover, the State asserts, this information by itself is not sufficient to cause competitive harm; it is only when information concerning the minimum initial capacity is

[12] As we noted above, see supra note 4, the State requests that the Board reject any proposed redactions from our January 5, 2004 reconsideration ruling on the procedural ground that PFS, by choosing to rely on the reasons advanced in its July 3, 2003 filing and in Mr. Parkyn's July 2, 2003 declaration relative to our May 2003 decisions, failed to provide a recent affidavit justifying its request to withhold the asserted confidential information. Given the follow-on relationship between our May 2003 decisions and the January 2004 reconsideration decision, we fail to see that this alone provides a basis for not entertaining PFS's proposed redactions.

[13] Environmental Report, Private Fuel Storage Facility, Docket No. 72-22, Skull Valley Indian Reservation, Tooele County, Utah (June 1997) [hereinafter ER].

[14] NUREG-1714, Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah (Dec. 2001).

evaluated with information about contracts PFS has signed that PFS will potentially suffer harm. See 7/14/03 State Response at 12-13.[15]

We do not agree that information relating to the minimum-sized initial facility has been made publicly available. PFS previously had explained it has no objection to disclosing the planned Phase I capacity of the facility (i.e., 10,000 metric tons uranium (MTU)). See 7/2/03 Parkyn Decl. ¶ 4 (readopting 9/25/00 Parkyn Decl. ¶ 4); cf. 7/14/03 State Response at 8-9 (citing ER at 3.2.3 (rev. 3) and 3.2-4 (rev. 6); FEIS at 1-1, 2-3 to 2-5). And while the State points to the FEIS discussion of the breakeven cost-benefit capacity being 10,000 MTU if a permanent repository opens in 2015, it fails to account for the discussion of the breakeven cost-benefit capacity being 8,200 MTU if a permanent repository opens in 2010. See FEIS at 8-10. Thus, there is no statement in either the ER or FEIS explicitly identifying the minimum initial capacity of the facility. Accordingly, for the same reasons discussed above in section II.C.1.a, we find that disclosure of the minimum-sized facility for purposes of satisfying LC-1 would lead to substantial competitive harm from potential competitors and customers and conclude that this information is confidential or privileged commercial or financial information within the meaning of section 2.790(b)(3)(i).

b. Bottom Line and Specific Cost Estimates

PFS also seeks redaction of its "bottom line" construction and O&M cost estimates, as well as the estimated costs of the specific components making up those bottom line costs. See 7/3/03 PFS Justification at 3-4; 7/24/03 PFS Reply at 3-5; see also 9/25/00 PFS Response at 5.

[15] As we noted above, for its part, the staff considers PFS's requests for confidential treatment of certain information in the decisional materials to be generally reasonable and objects only to two categories of redactions proposed by PFS (as noted in sections II.D.1.b and c below). See 7/14/03 Staff Response at 1-2; 1/30/04 Staff Response at 1-2.

PFS contends that disclosure of those costs could cause PFS substantial competitive harm in that such information could be used by competitors against PFS in the competition for customers or by customers, suppliers, and vendors in the negotiation of contracts for services. See 7/24/03 PFS Reply at 3-5; see also 9/25/00 Parkyn Decl. ¶¶ 5-7.

In its responses, the State argues that disclosure of not only the bottom line costs but also more detailed cost information is warranted, given that some of the information PFS seeks to withhold is already publicly available. See 7/14/03 State Response at 6-8. In this regard, the State points to specific cost estimate figures for the procurement and/or fabrication of canisters and storage casks, annual O&M storage fees, and the construction budget for an initial capacity facility, all of which were published and made publicly available in LBP-00-6, 51 NRC 101, 105 (2000), in the PFS license application, or on its website. See id. at 6-8. The staff agrees that PFS has waived its claim of confidentiality with respect to certain types of information that PFS itself has made public in its own newsletters and on its own website. See 7/14/03 Staff Response at 6-9. Both the State and the staff point out that at one time, PFS had displayed on its website the estimated cask and canister costs of a full-capacity, 4,000-cask facility, bottom line construction and O&M costs, decommissioning costs, and total costs to develop and operate the facility. See id. at 7; 7/14/03 State Response at 8.

PFS readily concedes that at one time it had published "facility cost information" on its website. See 7/3/03 PFS Justification at 3 n.3. On July 3, 2003, the following information appeared on the PFS website:

> Much of the $3.1 billion cost of developing and operating the facility over its maximum 40-year life will be spent in Utah:
>
> | | |
> |---|---|
> | Site construction | $101 million |
> | 4,000 steel canisters and casks | $1.9 billion |
> | 40-year operation costs | $1 billion |

Decommissioning casks	$68 million
Decommissioning facility and site	$1.6 million
Total	**$3,170,600,000**

7/14/03 Staff Response, attach. 1 (PFS website). In addition, in various versions of its An Inside Look... newsletter, PFS estimated that it would spend $430 million to procure or fabricate the canisters and $134 million for the storage casks for a 4,000 cask facility and that facility construction, including 500 concrete storage pads, would total about $101 million and that the casks and canisters would be valued at $1.8 billion over the project's life. See 7/14/03 Staff Response, attachs. 2-4 (An Inside Look... News about Private Fuel Storage, Tooele County, Utah (Private Fuel Storage) Spring 1998, at 4; Fall 1999, at 1; Business to Business Expo Ed. 2000, at 1); see also LBP-00-6, 51 NRC at 105.

Consequently, under the five-factor section 2.790(b)(4) test, we are unable to conclude, as PFS would have us, that PFS has held this information in confidence, that this information is of a type customarily held in confidence by PFS, and that this information is or previously was not available in public sources. Although the actual dollar amounts previously released may not be identical to those of the same cost categories as they appear in the decisional materials, consistent with the reasoning of the United States Court of Appeals for the District of Columbia Circuit in Center for Auto Safety v. NHTSA, 244 F.3d 144, 151-52 (D.C. Cir. 2001), we find the dollar amounts in the decisional materials in question are of the same type of information and of the same level of detail that has previously been available to the public. Accordingly, information relative to the following items is not confidential or privileged commercial or financial information under the first prong of 10 C.F.R. § 2.790(b)(3): (1) total construction costs for a 4,000 cask facility (i.e., $172,300,000); (2) total O&M costs for a 4,000 cask facility over a 40-year period (i.e., $2,888,493,125); (3) total cask and canister costs for a 4,000 cask facility (i.e.,

$1,911,000,000); (4) canister costs for a 4,000 cask facility (i.e., $1,302,200,000); and (5) cask costs for a 4,000 cask facility (i.e., $608,800,000).[16]

i. Other Cost Components

In addition to the bottom line costs and certain specific cost categories discussed above, the State disputes the confidential nature of several additional cost components.

(1) Skull Valley Band Host Payments

PFS requests redactions of information concerning its host payments to the Skull Valley Band. See 7/3/03 PFS Justification at 5. According to PFS, disclosure of the commercially sensitive host payment information to potential competitors or customers could cause PFS substantial competitive harm. See id.; 5/15/00 Parkyn Aff. ¶ 5 (readopted in 7/2/03 Parkyn Decl. ¶ 4). PFS contends that such information could be used against it in the negotiation of contracts for services or in the competition for customers. See 5/15/00 Parkyn Aff. ¶ 5. In response, the State argues that PFS has relied on non-specific claims that fail to meet the requirements of section 2.790. See 7/14/03 State Response at 14.

Unlike the five items in section II.D.1.b above that do not merit redaction, neither the State nor the staff disputes that PFS has kept Skull Valley Band host payment information confidential. Based on the harm PFS attests it will suffer from potential competitors and customers if this information were made publicly available, we find that the Skull Valley Band host payment information is confidential or privileged commercial or financial information under section 2.790(b)(3).

[16] Although the PFS website had also displayed the estimated costs of decommissioning the casks as well as the facility and site, see 7/14/03 Staff Response, attach. 1, these figures ($68 million and $1.6 million, respectively) do not appear in the four Board decisions at issue.

(2) Tooele County Host Payments

PFS also requests redaction of certain information concerning its host payments to Tooele County. In response to the State's assertion that the agreement between PFS and the county is a public document whose payment terms are already in the public domain, see 7/14/03 State Response at 9, PFS asserts that it seeks protection for only the calculations made by the State's expert that were addressed in ¶¶ 4.71 and 4.72 of the Board's Utah E/Confederated Tribes F Partial Initial Decision, rather than the payment terms themselves, see 7/24/03 PFS Reply at 5 n.9.

Although PFS initially sought to withhold from disclosure all host payment information, see 5/15/00 Parkyn Aff. ¶ 5, PFS later clarified in its July 24, 2003 response that with respect to the Tooele County payments, it sought only to redact references to the State's calculations indicating an underpayment to the county, see 7/24/03 PFS Reply at 5 n.9. Aside from a passing reference to the State's calculations in a footnote, see id., we were unable to find any specific references to or any specific justification for redacting these calculations in the five affidavits/declarations filed by Mr. Parkyn requesting confidential treatment. Accordingly, we cannot conclude that this information constitutes confidential or proprietary commercial or financial information under the Commission's two-part test.

(3) Castle Rock Settlement **xxxxxxxx**

PFS also seeks to withhold information relative to its settlement with Castle Rock. PFS argues that if the facts that (1) it has entered into a settlement agreement; and (2) **xxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** pursuant to that agreement were to be publicized, those disclosures could encourage other parties to file suits against it, resulting in "potential financial harm" to PFS. 7/3/03 PFS Justification at 8-9; 7/2/03 Parkyn Decl. ¶ 6. The State asserts that

the PFS claim of harm is purely speculative, given the PFS failure to provide any evidence suggesting that there may be another entity in a position to make such a claim against it. See 7/14/03 State Response at 14.

Putting aside the issue of whether there are entities in existence that may file suits against PFS in the hopes of obtaining payments in exchange for a settlement, we find that the PFS justification for withholding this information does not satisfy the section 2.790(b) test. In our view, it is of significant importance that the fifth factor of section 2.790(b)(4) considers whether public disclosure of the information at issue will cause substantial competitive harm, and not merely financial harm. Thus, in the absence of any support for the possibility of injury to the PFS competitive position from potential competitors, customers, or other vendors, we conclude that information relative to the Castle Rock settlement does not warrant proprietary treatment.

c. **xxxxxxxxxxxxxx** and Pass-Through Costs

PFS requests confidential treatment for information relating to the intention of PFS to fund construction of the facility in part by **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** and its intention to pass its O&M costs through to its customers. See 7/3/03 PFS Justification at 6. PFS asserts that the mere knowledge of its funding plan would provide vendors, suppliers, and subcontractors with information about PFS contractual relationships with its customers, to the competitive detriment of PFS and its customers. See 7/2/03 Parkyn Decl. ¶ 5. By way of example, PFS contends that if a **xxxx** vendor understood prior to contract negotiations with PFS that **xxxx** costs would be passed through to the customers, it could result in a substantial upward adjustment of the vendor's prices. See id. And with respect to pass-through costs, although PFS does not object to disclosure of the general fact that some of its costs will be

passed through to its customers, it argues that knowledge of the specific pass-through categories (i.e., all O&M categories) and their costs would enable competitors to provide identical or more competitive terms to PFS potential customers. See 9/25/00 Parkyn Decl. ¶ 9 (readopted by 7/2/03 Parkyn Decl. ¶ 4). Also in this regard, PFS seeks redaction of any mention of the Commission's Monticello decision in connection with any discussion of pass-through costs. See 7/3/03 PFS Justification at 7. According to PFS, because the applicant in Monticello passed all of its O&M costs through to the plant owner, the Board's discussion of Monticello would "strongly imply" to a reader that PFS similarly intends to pass all of its O&M costs through to its customers. Id.

In its responses, the State argues that because the Board's discussion and analysis of Monticello originated with the Board (an arm of a federal agency), rather than with PFS, those references are not entitled to confidential treatment. See 7/14/03 State Response at 10. The State also takes issue with the PFS claim that knowledge of its intended funding plan would provide vendors with a competitive advantage over PFS during negotiations. See id. at 11-12; 1/30/04 State Response at 7-8.

While the staff finds the PFS justification for withholding the categories of costs that will be passed through to customers to be reasonable, it does not consider the PFS basis for redacting the Board's references to Monticello to be tenable. See 7/14/03 Staff Response at 2-5. Because the Board did not discuss the nature of the pass-through arrangement at issue in Monticello in its Utah E/Confederated Tribes F Partial Initial Decision, in the Staff's view, a reader would have no basis to conclude that PFS, like the applicant in Monticello, intended to pass through all of its costs. See id. at 3.

Bearing in mind once again the guidance of the Utah and Continental Oil courts, we accept the PFS claim that it will suffer competitive harm if vendors, suppliers, and subcontractors learn of the intention of PFS to **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** and pass O&M costs through to its customers and use that knowledge against PFS in contract negotiations.[17] We do not, however, similarly accept the PFS argument with respect to redacting all mention of the Monticello decision. In reviewing our decisions for references to Monticello, we were unable to identify any instance in which our discussion of that Commission decision would suggest to a reader that PFS intended to adopt the same pass-through arrangement used by the applicant in Monticello. Indeed, our references to Monticello largely appeared in our summaries of PFS justifications for its pass-through plan, and nowhere in those discussions or in our analysis of Monticello's applicability to the present proceeding did we include the factual details of that applicant's funding plan.[18] Consequently, we conclude that any references to the Monticello decision do not merit proprietary treatment and are to be publicly disclosed along with the vast majority of the decisional materials.

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[17] Although the State attempts to refute the PFS claim of harm by pointing to the PFS memorandum of understanding with **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** that affords PFS most favored client status for **xxxxxxxxxxxxxxxxxx** it purchases, see 7/14/03 State Response at 11; 1/30/04 State Response at 7-8, it seems apparent the **xxxx** vendor example provided by Mr. Parkyn is but one of a number of vendors PFS would be dealing with over the course of the facility's license term.

[18] In this regard, we are not persuaded that the word "grossly," as it appears in ¶ 3.29 of the Utah E/Confederated Tribes F partial initial decision, suggests that PFS plans to pass through all or most of its O&M costs to its customers and should, therefore, be redacted. See 7/24/03 PFS Reply at 6 n.11. We used "grossly" merely to summarize the State's characterization of the estimates derived by PFS and the staff. See Utah E/Confederated Tribes F Partial Initial Decision ¶ 3.29 ("The State claims that by treating certain expenditures, . . . as revenue rather than expenses, PFS and the staff have grossly underestimated the overall costs of the ISFSI project.").

d. Level of Onsite Property Insurance

PFS also seeks to withhold from disclosure information as to the precise amount of insurance that it intends to maintain.[19] See 7/3/03 PFS Justification at 4-5. Relying on Mr. Parkyn's September 25, 2000 declaration, PFS argues that such information could be used by its competitors to seek to match or attempt to distinguish themselves from PFS in their negotiations with potential customers. See id.; see also 9/25/00 Parkyn Decl. ¶ 10. In opposing the PFS request, the State asserts that PFS is relying on non-specific generalized claims of harm that fail to satisfy the requirements of section 2.790. See 7/14/03 State Response at 14.

For the reasons discussed above in connection with property insurance-related redactions from the evidentiary materials, see section II.C.1.d above, we find that the maximum available amount of onsite property insurance and the amount of onsite property insurance PFS intends to maintain qualify as confidential financial or commercial information under 10 C.F.R. § 2.790(b)(3)(i). However, as we noted there as well, because PFS has provided no basis in any of its filings or supporting declarations for withholding information relative to the course of action PFS plans to take if its intended level of onsite insurance coverage can no longer be maintained at an annual premium of **xxxxxxxx**, we are unable to conclude that such information is confidential or proprietary.

e. Other Model Service Agreement Terms

Finally, PFS requests confidential treatment with respect to other specific terms and conditions in its customer Model Service Agreement (MSA) (in addition to the terms concerning

[19] PFS does not object to the disclosure of the base amount of property insurance it will maintain (i.e., $70 million). See 7/3/03 PFS Justification at 4-5.

xxxxxxxxxxxxxxxxxxxxxxxxxxxx and pass through costs). See 7/3/03 PFS Justification at 7-8. According to PFS, disclosure of the MSA terms and conditions would cause PFS substantial competitive harm in that potential customers would have a significant competitive advantage during negotiations with PFS and potential competitors would be in possession of advantageous information. See Declaration of John D. Parkyn Pursuant to 10 C.F.R. § 2.790 (Dec. 4, 2000) ¶¶ 4-5 (readopted by 7/2/03 Parkyn Decl. ¶ 4). In its responses opposing redactions of any MSA terms, the State asserts that PFS is once again relying on non-specific generalized claims of harm that fail to satisfy the requirements of section 2.790. See 7/14/03 State Response at 14.

Recognizing the competitive harm that PFS would suffer from the disclosure of the additional MSA terms and conditions to its competitors and potential customers, we conclude that this information constitutes proprietary commercial or financial information within the first prong of section 2.790(b)(3).

2. Application of Prong 2: Balancing the Interests

Relative to the Board's decisional materials, we have concluded thus far under section 2.790(b)(3) prong one that information concerning the following warrants confidential or privileged treatment: (1) the minimum initial capacity of the facility; (2) Skull Valley Band host payments; (3) the PFS intention to **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** and to pass through all O&M costs to its customers; (4) the maximum amount of onsite property insurance available to PFS and the amount of onsite property insurance PFS intends to maintain; and (5) additional MSA terms and conditions. In connection with section 2.790(b)(3) prong two, however, the State urges the Board to release all four of our financial assurance-related decisions in their entirety so that the public can know the substantive bases and

rationales underlying those decisions. See 7/14/03 State Response at 14-15; 1/30/04 State Response at 9-10.

As we see it, the public's understanding of our reasoning will not be compromised by our approval of certain of the proposed PFS redactions. And as the State noted, in crafting those four decisions, we attempted to minimize the use of proprietary information so that they could, in substantial part, be placed in the public record of this proceeding. Thus, again bearing in mind the Point Beach Board's characterization of the competing commercial and public interests at play, we find that the risks of competitive harm to PFS outweigh the public interest in disclosing these five categories of information.

III. CONCLUSION

For the reasons set forth above, we approve the proposed PFS redactions from the evidentiary materials, with the exception of its request to redact portions of Mr. Parkyn's pre-filed testimony relative to the PFS planned course of action if a **xxxxxxxx** annual premium will no longer cover its intended level of insurance coverage. Additionally, we approve the requested redactions from the decisional materials of information with respect to (1) the minimum initial capacity of the facility; (2) Skull Valley Band host payments; (3) the PFS intention to **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** and to pass through all O&M costs to its customers; (4) the maximum amount of onsite property insurance available to PFS and the amount of onsite property insurance PFS intends to maintain; and (5) additional MSA terms and conditions. However, we deny the PFS request to redact the following information from the decisional materials: (1) total construction costs for a 4,000 cask facility; (2) total O&M costs for a 4,000 cask facility over a 40-year period; (3) total cask and canister costs for a 4,000

cask facility; (4) canister costs for a 4,000 cask facility; (5) cask costs for a 4,000 cask facility; (6) Tooele County host payments; (7) references to the PFS settlement with Castle Rock; (8) references to the Monticello decision; and (9) the PFS planned course of action if a **xxxxxxxx** annual premium will no longer cover its intended level of insurance coverage.

Our specific rulings relative to the evidentiary materials in this regard are set forth in the listings in appendices A-L to this memorandum and order. Also in this regard, appendix M provides a listing of the parties' joint corrections to the transcripts for these sessions, including a notation as to which corrections would involve proprietary information per this ruling. Finally, appendices N-Q contain listings of our specific rulings relative to the Board's decisions on redaction of portions of our financial assurance issuances.[20]

Finally, in the event either PFS, the State, or the staff wishes to request that the Board stay the release of otherwise purported confidential information pending an attempt to seek Commission review of this decision, the Board will delay release of any of the evidentiary or decisional materials encompassed by this decision for seven days to provide time to file such a motion with the Board. Party responses to such a motion must be filed within seven days

[20] In addition to rulings on what portions of the evidentiary and decisional materials can be placed on the public record, the State requests a Board ruling on what portions of the parties' filings addressing these materials can also be publicly released. See 7/14/03 State Response at 2 n.4. We decline to do so. Putting aside the fact that the State has not provided us with any argument to justify the disclosure of any specific materials, in our view the public's ability to access a substantial portion of the evidentiary and decisional materials will be more than sufficient for the public's understanding of each party's position and of the Board's reasoning.

thereafter. If such a motion is filed, the Board will not release any of the evidentiary or decisional materials pending its disposition of the motion.

For the foregoing reasons, it is this thirty-first day of March 2004, ORDERED, that:

1. The evidentiary and decisional materials relating to contention Utah E/Confederated Tribes, Financial Assurance, and contention Utah S, Decommissioning, are disclosed/redacted to the degree specified in appendices A-L and N-Q that accompany this memorandum and order.

2. The transcripts for the June 20-22, and 27, 2000 evidentiary hearing sessions are corrected in accordance with appendix M to this memorandum and order.

3. Any party wishing to seek a stay pending Commission review of the release of any evidentiary or decisional material encompassed by this memorandum and order must file a motion for a stay within seven days of the date of this issuance, or on or before April 7, 2004, and any party response to such a motion must be filed within seven days thereafter.

4. Any party wishing to file a petition for review of this memorandum and order on the grounds specified in 10 C.F.R. § 2.786(b)(4) must do so within fifteen (15) days after service of this memorandum and order. The filing of a petition for review is mandatory in order for a party to have exhausted its administrative remedies before seeking judicial review. Within ten (10) days after service of a petition for review, parties to this proceeding may file an answer

supporting or opposing Commission review. Any petition for review and any answer shall conform to the requirements of 10 C.F.R. § 2.786(b)(2)-(3).

THE ATOMIC SAFETY
AND LICENSING BOARD[21]

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

/RA/

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

March 31, 2004

[21] Pursuant to previous Board issuances on e-mail service of documents identified as potentially containing proprietary information, copies of this memorandum and order and the accompanying appendices 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 regarding redaction of the evidentiary and decisional material relative to contention Utah E/Confederated Tribes F and contention Utah S. See Licensing Board Memorandum (Notice Regarding Issuance of Decision Concerning Disclosure/Redaction of Evidentiary and Decisional Materials Relating to Contentions Utah E/Confederated Tribes F and Utah S; Adopting Transcript Corrections Relating to Contentions Utah E/Confederated Tribes F and Utah S) (March 31, 2004) (unpublished). At such time as these materials are actually placed in the public record of this proceeding, the Licensing Board will advise the parties by an additional issuance.

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 REDACTED VERSION OF LB MEMORANDUM AND ORDER (DISCLOSURE/REDACTION OF EVIDENTIARY AND DECISIONAL MATERIALS RELATING TO CONTENTIONS UTAH E/CONFEDERATED TRIBES F AND UTAH S; ADOPTING TRANSCRIPT CORRECTIONS RELATING TO CONTENTIONS UTAH E/CONFEDERATED TRIBES F AND UTAH S) 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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Docket No. 72-22-ISFSI
REDACTED VERSION OF LB MEMORANDUM AND ORDER
(DISCLOSURE/REDACTION OF EVIDENTIARY AND
DECISIONAL MATERIALS RELATING TO CONTENTIONS
UTAH E/CONFEDERATED TRIBES F AND UTAH S;
ADOPTING TRANSCRIPT CORRECTIONS RELATING
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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