

RAS 10298

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION . **DOCKETED 08/12/05**

LBP-05-23

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

PRIVATE FUEL STORAGE, L.L.C.

(Independent Spent Fuel Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

January 5, 2004

MEMORANDUM AND ORDER

(Granting in Part and Denying in Part Motion for
Reconsideration and/or Clarification of Financial Qualifications Decisions)

[Note: Although this memorandum and order was originally issued in January 2004, 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.]

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 PRIVATE FUEL STORAGE, L.L.C. (Independent Spent Fuel Storage Installation)

Docket No. 72-22-ISFSI
ASLBP No. 97-732-02-ISFSI
January 5, 2004

MEMORANDUM AND ORDER
(Granting in Part and Denying in Part Motion for
Reconsideration and/or Clarification of Financial Qualifications Decisions)

Pending with this Licensing Board is a June 6, 2003 motion filed by applicant Private Fuel Storage, L.L.C., (PFS) requesting clarification and/or reconsideration of the Board's May 27, 2003 memorandum and order ruling on a PFS summary disposition motion and other filings relating to the Commission's remand from CLI-00-13, 52 NRC 23 (2000), and a partial initial decision issued that same date regarding the merits of contention Utah E/Confederated Tribes F, Financial Assurance. The State of Utah (State), the lead intervenor on contention Utah E/Confederated Tribes F, opposes the PFS request, while the NRC staff supports the motion in part and opposes it in part. For the reasons set forth below, we grant the motion in part and deny it in part.

I. BACKGROUND

Although detailed descriptions of the events leading up to the two decisions that are the subject of the pending PFS reconsideration request are outlined in those issuances, to place the motion in context we note here that the object of this proceeding is the June 1997 application for a 10 C.F.R. Part 72 license through which PFS seeks agency permission to construct and operate an independent spent fuel storage installation (ISFSI) on the reservation of the Skull Valley Band of Goshute Indians (Skull Valley Band) in Skull Valley, Utah. Following a notice of opportunity for a hearing, see 62 Fed. Reg. 41,099 (July 31, 1997), the State and the Confederated Tribes of the Goshute Reservation (Confederated Tribes) filed petitions to intervene pursuant to 10 C.F.R. § 2.714, which the Board subsequently granted. See LBP-98-7, 47 NRC 142, 157, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998). In doing so, the Board admitted in part and consolidated two of these parties' financial assurance contentions into contention Utah E/Confederated Tribes F, with the State being designated as the lead intervenor for litigation of this contention. See id. at 187, 236; Licensing Board Memorandum and Order (Memorializing Prehearing Conference Rulings) (May 20, 1998) at 2 (unpublished).

PFS subsequently filed a motion requesting summary disposition on all portions of contention Utah E/Confederated Tribes F, except paragraph six. See [PFS] Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (Dec. 3, 1999) at 3. The State opposed the motion, while the staff, in supporting the motion, outlined two proposed license conditions to implement financial assurance-related commitments made

by PFS.¹ See [State] Response to the [PFS] Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes Contention F (Dec. 27, 1999) at 3-14; NRC Staff's Response to [PFS] Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (Dec. 22, 1999) at 4-5.

On March 10, 2000, the Board granted in part and denied in part the PFS dispositive motion and found that the license conditions proposed by the staff could appropriately be used to establish compliance with 10 C.F.R. § 72.22(e) financial assurance requirements. See LBP-00-6, 51 NRC 101, 113-117 (2000). The only contention Utah E/Confederated Tribes F-related issues thus remaining for further Board consideration in an evidentiary proceeding were (1) the adequacy of PFS's onsite property insurance coverage (paragraphs five and ten); and (2) the adequacy of the PFS construction and operating cost estimates (paragraph six). Also in connection with this determination, the Board referred to the Commission its ruling endorsing the application to Part 72 ISFSI facilities of the financial assurance standard for Part 70 uranium enrichment facilities, rather than that for Part 50 power

¹ Those proposed license conditions provided:

"A. Construction of the [PFS] Facility shall not commence before funding (equity, revenue, and debt) is fully committed that is adequate to construct a Facility with the initial capacity as specified by PFS to the NRC [xxxxxxxxxxxx capacity]. Construction of any additional capacity beyond this initial capacity amount shall commence only after funding is fully committed that is adequate to construct such additional capacity.

B. PFS shall not proceed with the Facility's operation unless it has in place long-term Service Agreements with prices sufficient to cover the operating, maintenance, and decommissioning costs of the Facility, for the entire term of the Service Agreements."

LBP-00-6, 51 NRC 101, 109 (2000) (quoting NRC Staff's Response to [PFS] Motion for Partial Summary Disposition of Utah E/Confederated Tribes F (Dec. 22, 1999) at 7).

reactor facilities, in accord with the Commission's decision in Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997). See id. at 136. The Board then held evidentiary hearings in Salt Lake City, Utah, during which eight witnesses testified on behalf of PFS, the staff, and the State on June 20-22, 27, 2000, regarding contention Utah E/Confederated Tribes F. See Tr. at 1673-2413, 2556-681.

Thereafter, in August 2000, the Commission ruled on the March 2000 referral of the Board's summary disposition order regarding contention Utah E/Confederated Tribes F. See CLI-00-13, 52 NRC 23 (2000). The Commission accepted the proposition that license conditions should be adopted to incorporate various PFS financial assurance-related promises, including those relating to funding commitments and in-place service agreements with prices adequate to finance operations and maintenance and decommissioning expenses for the life of the PFS license.² However, the Commission disagreed that, in the absence of a model service agreement (MSA), PFS commitments alone provided a sufficient basis for a reasonable assurance finding based on post-licensing staff inquiry. See id. at 32. As a consequence, the Commission directed that an MSA be provided by PFS that met all the PFS commitments relied upon by the Board in making its adequate financial assurance findings.³ See id. at 34-36.

² The Commission indicated that LC 17-2 should read:

PFS shall not proceed with the Facility's operation unless it has in place Service Agreements covering the entire term of the license, with prices sufficient to cover the operating, maintenance, and decommissioning costs of the Facility for the entire term of the license.

CLI-00-13, 52 NRC at 32.

³ In this regard, the Commission directed that:

(continued...)

PFS filed its MSA on September 29, 2000, in accordance with the Board's scheduling order, along with a summary of the financial provisions and a request that proprietary information remain confidential. See [PFS] Submission of [MSA] (Sept. 29, 2000); Licensing Board Order (Schedule for Submission of Sample Service Agreement) (Aug. 16, 2000) at 1-2 (unpublished). The State then filed a motion to reopen the hearing record on contention Utah E/Confederated Tribes F and subsequently submitted objections to the MSA as unable to meet Part 72 financial assurance requirements. See [State] Motion to Re-open the Hearing Record on Contention Utah E (Nov. 7, 2000) at 1 (State Motion); [State] Objections to the Adequacy of the [PFS MSA] to Meet Part 72 Financial Assurance Requirements (Nov. 7, 2000) at 1. On December 4, 2000, PFS responded by moving for summary disposition on the ground that no genuine issue as to any material fact remained relative to the issues remanded by the Commission, a request PFS supported with an updated MSA and one which the State opposed and the staff did not. 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) at 1, 4-8; [State] Response to [PFS] Motion for Summary

³(...continued)

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 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.

Disposition on Issues Remanded by CLI-00-013 on Utah Contention E/Confederated Tribes Contention F (Dec. 22, 2000); 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).

In a May 27, 2003 memorandum and order, the Board denied the State's reopening motion and granted the PFS dispositive motion regarding contention Utah E/Confederated Tribes F, but phrased the financial assurance license conditions LC 17-1 and LC 17-2 [hereinafter LC-1 and LC-2, respectively] differently than the staff's license condition language referenced by the Commission in CLI-00-13. See LBP-05-20, 62 NRC __, __ (May 27, 2003) (slip op. at 3-4); see CLI-00-13, 52 NRC at 27, 32. On the same day, the Board also ruled on contention Utah E/Confederated Tribes F itself, finding PFS had provided reasonable assurance of its financial qualifications in compliance with 10 C.F.R. § 72.22(e). See LBP-05-21, 62 NRC __, __ (May 27, 2003) (slip op. at 102). In accordance with LC-2, the Board stated that operations could not commence until service agreements were in place with adequate operations and maintenance (O&M), and decommissioning prices. See id. at 95. The total amount of the prices specified by the Board was based on costs for operating a full-capacity facility. See id. at 86, 95.

On June 6, 2003, PFS filed its motion requesting clarification/and or reconsideration of the Board's May 27 summary disposition determination and its contention Utah E/Confederated

Tribes F partial initial decision, to which the State and the staff responded on June 16, 2003. See [PFS] Motion for Clarification and/or Reconsideration of [Summary Disposition Decision and Contention Utah E Initial Decision] (June 6, 2003) [hereinafter PFS Reconsideration Motion]; [State] Response to [PFS Reconsideration Motion] (June 16, 2003) [hereinafter State Reconsideration Response]; NRC Staff's Response to [PFS Reconsideration Motion] (June 16, 2003) [hereinafter Staff Reconsideration Response]. PFS thereafter requested an opportunity to reply to the State's response to the PFS June 6 reconsideration motion, which the Board granted on June 19, 2003. See [PFS] Request to File a Reply to [State Reconsideration Response] to [PFS Reconsideration Motion] (June 19, 2003); Licensing Board Order (Granting Request to File Reply Pleading) (June 19, 2003) (unpublished). The PFS reply pleading was filed on June 24, 2003. See [PFS] Reply to [State Reconsideration Response] (June 24, 2003) [hereinafter PFS Reconsideration Reply].

II. ANALYSIS

A. Standard Governing Reconsideration Requests

Relative to the party arguments made in connection with the pending PFS reconsideration request, as we have noted elsewhere in this proceeding:

A properly supported reconsideration motion is one that does not rely upon (1) entirely new theses or arguments, except to the extent it attempts to address a presiding officer's ruling that could not reasonably have been anticipated, see Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 & n. 1 (1997) (citing cases); or (2) previously presented arguments that have been rejected, see Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Instead, the movant must identify errors or deficiencies in the presiding officer's determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that

should have controlling effect; or (2) some critical factual information. See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140 (1994); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83- 25, 17 NRC 681, 687, rev'd and remanded on other grounds, ALAB-726, 17 NRC 755 (1983).

LBP-98-17, 48 NRC 69, 73-74 (1998). In addition, as we have observed on another occasion:

Although a party may not base a reconsideration motion on new information or a new thesis, see LBP-98-10, 47 NRC [288,] 292 (1998) (citing Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997)), a request to reexamine existing record material that may have been misunderstood or overlooked, or to clarify a matter that the party believes is unclear, is appropriate, see id. at 296-97 (citing Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687 (1983)).

LBP-99-39, 50 NRC 232, 237 (1999). It is these general precepts we are called upon to apply in this instance.

B. PFS Clarification/Reconsideration Motion

In its motion pending before the Board, PFS seeks (1) clarification of the financial license conditions applicable to PFS; and (2) reconsideration and/or clarification of (a) the need to set a specific dollar amount for O&M costs, or in the alternative, (b) the specific O&M dollar amount established by the Board in ¶ 4.79 of the contention Utah E/Confederated Tribes F partial initial decision. See PFS Reconsideration Motion at 1, 6. We address each of these requests below.

1. Clarification of Terms of License Conditions LC-1 and LC-2. PFS first seeks clarification that license conditions LC-1 and LC-2 be applied to PFS as they were stated by the Commission in CLI-00-13.⁴ PFS claims the Board's restatement of LC-1 and LC-2 in its

⁴ As we previously have noted, see LBP-05-20, 62 NRC at __ (slip op. at 3 n.1), the initial (continued...)

summary disposition determination is significant because those license conditions, as approved or revised by the Commission in CLI-00-13, 52 NRC at 27, 32, in contrast to the Board's restatement of LC-1 and LC-2, see LBP-05-20, 62 NRC at __ (slip op. at 3-4),⁵ permit PFS to (1) obtain funding in the form of equity, revenue, or debt; (2) obtain such funding on a phase-by-phase basis corresponding to the stage-by-stage construction of the facility; and (3) operate a facility at less than full capacity without being required to have service agreements in place with prices adequate to fund the exact dollar amount of O&M and decommissioning costs for a full-scale, 4,000-cask facility. See PFS Reconsideration Motion at 4-6.

While the State opposes the PFS motion for clarification and/or reconsideration in its entirety, it nonetheless proposes its own rewording of LC-1.⁶ See State Reconsideration

⁴(...continued)

license conditions were designated by the staff as LC17-1 and LC17-2 based on nomenclature that tied the numbering of the proposed conditions to a particular section of the staff's December 15, 1999 Safety Evaluation Report. For ease of reference, we adopted the same numbering order as the Commission outlined in CLI-00-13 for these and other Commission-directed license conditions, albeit noting that when actually incorporated into any PFS license these conditions could well be numbered differently.

⁵ Neither the Board's summary disposition decision nor its contention Utah E/Confederated Tribes F partial initial decision has been issued publicly, pending the resolution of what portions of the record may be made available to the public and what portions should be withheld as proprietary information. Following receipt of the parties' views on redaction of this reconsideration motion decision, the Board anticipates making redacted versions of both Board rulings, as well as the Board's May 27, 2002 partial initial decision regarding contention Utah S, Decommissioning, and this reconsideration determination publicly available.

⁶ Specifically, the State proposes that LC-1 should be rewritten to provide:

In accordance with LBP-03-__, Findings ¶¶ 4.53 and 4.56, PFS shall not commence construction of the facility before funding (equity, revenue, and debt) is fully committed to construct a facility with a xxxxxxxxxxxxxxxxxxxxxx capacity, in the amount xxxxxxxxxxxxxx. These costs are to be escalated from fourth

(continued...)

Response at 1, 4. For its part, the staff supports this aspect of the PFS motion. See Staff Reconsideration Response at 4-5.

We grant the PFS motion to the extent that it requests clarification of these license conditions with which it must comply. In quoting the Commission's directive to the staff to memorialize certain PFS commitments as license conditions as part of the background summary of our May 27, 2003 ruling, see LBP-05-20, 62 NRC at __ (slip op. at 3-4), the Board had no intention of either altering the language of LC-2, the one license condition explicitly set forth by the Commission, or altering the burden on PFS to demonstrate its financial qualifications. See also id. at 3 n.2 (acknowledging Commission's revision of LC-2). Thus, with respect to the construction and operation of its facility, the following license conditions, as endorsed or revised by the Commission in CLI-00-13, apply to PFS:

LC-1. Construction of the Facility shall not commence before funding (equity, revenue, and debt) is fully committed that is adequate to construct a facility with the initial capacity as specified by PFS to the NRC. Construction of any additional capacity beyond this initial capacity amount shall commence only after funding is fully committed that is adequate to construct such additional capacity.

LC-2. PFS shall not proceed with the Facility's operation unless it has in place Service Agreements covering the entire term of the license, with prices sufficient to cover the operating, maintenance, and decommissioning costs of the Facility for the entire term of the license.

⁶(...continued)

quarter 1999 dollars to present day value in accordance with the factors in Model Service Agreement Schedule 5.

Construction of any additional capacity beyond Phase I shall commence only after funding (equity, revenue, and debt) is fully committed to construct Phase II (an additional 10,000 MTU capacity in the amount **xxxxxxxxxxxx**) or Phase III (20,000 MTU in the amount of **xxxxxxxxxxxx**). These construction costs are to be escalated as described for Phase I.

See State Reconsideration Response at 4 (footnote omitted).

2. Clarification/Reconsideration of MSA Pass-Through Mechanism. PFS next requests reconsideration and/or clarification of the Board's contention Utah E/Confederated Tribes F partial initial decision to reflect the pass-through mechanism established in its MSA to cover its O&M costs, which PFS argues is an appropriate method for showing adequate financial assurance pursuant to the Commission's Monticello decision. See PFS Reconsideration Motion at 6 & n.7 (citing Northern States Power Co. (Monticello Nuclear Generating Plant), CLI-00-14, 52 NRC 37 (2000)). PFS argues that because the Board's ruling requires PFS to demonstrate funding to cover a specific dollar amount of O&M costs, rather than allowing PFS to rely solely on the pass-through mechanism, the contention Utah E/Confederated Tribes F partial initial decision is inconsistent with Monticello. See id. at 6. Specifically, PFS proposes that the following language be substituted for the last sentence of ¶ 4.79 of the contention Utah E/Confederated Tribes F partial initial decision:

PFS has met its financial assurance obligations with respect to O&M and decommissioning costs because of the cost pass-through nature of the MSA and the facts that PFS's customers will be subject to the Commission's Part 50 financial assurance requirements and the MSA's customer financial assurance provisions (i.e., license condition LC-4). This arrangement provides sufficient assurance of PFS's financial qualifications.

See id. at 8 (citations and footnote omitted).⁷

⁷ This PFS suggested language would replace the following sentence in the contention Utah E/Confederated Tribes F partial initial decision:

In accordance with the Commission's instructions in CLI-00-13, the Board finds that PFS may not commence operations before service agreements for the life of the license (i.e., twenty years) are in place with prices adequate to fund operations, maintenance, and decommissioning in the amount of

(continued...)

In their respective responses to the PFS motion, both the State and the staff oppose reconsideration of this aspect of the Board's ruling in its contention Utah E/Confederated Tribes F partial initial decision. For its part, the State contends that because the PFS suggested change to ¶ 4.79 would authorize the pass-through of **XXXXXXXXXXXXXXXXXXXX** **XXXXXXXXXXXXXXXXXXXX**, but all O&M costs, to its customers as a way of demonstrating PFS financial qualifications, the proposed language substitution constitutes a new argument that, despite having ample opportunity to do so, PFS has not yet presented in this proceeding. See State Reconsideration Response at 5-6. In addition to challenging the PFS reliance on Monticello as a basis for relieving PFS of having to demonstrate funding to cover specific O&M dollar amounts, both the State and staff argue that the Commission in CLI-00-13 clearly directed the Board to establish specific dollar amounts for construction and O&M cost estimates. See State Reconsideration Response at 6-8; Staff Reconsideration Response at 6-7.

We deny the PFS request for reconsideration and/or clarification on this point. Regardless of whether Monticello discharges PFS of its duty to demonstrate sufficient funding to cover a specific dollar amount of O&M costs, Monticello clearly does not discharge the Board of its duty to heed a Commission mandate issued in the instant Private Fuel Storage proceeding. In CLI-00-13, the Commission directed that a condition be included in the PFS license that would prevent PFS from commencing operations before having service agreements

⁷(...continued)

XXXXXXXXXXXXXXXXXXXX (to be escalated from 1997 dollars to present day value) plus \$12 million for Tooele County host payments.

See LBP-05-21, 62 NRC at __ (slip op. at 95-96) (¶ 4.79).

in place with prices, “in the amount to be determined at hearing,” adequate to cover O&M and decommissioning costs. CLI-00-13, 52 NRC at 36 (emphasis added). Consequently, although we recognized in our contention Utah E/Confederated Tribes partial initial decision that the Commission’s ruling in Monticello “might well relieve PFS of its obligation to provide a specific estimate of the costs it intends to pass through to its customers,” LBP-05-21, 62 NRC at __ (slip op. at 68) (¶ 4.21), we also determined, “[i]n accordance with the Commission’s instructions in CLI-00-13,” that to satisfy LC-2, PFS could not begin operations without having service agreements in place that would cover O&M and decommissioning costs in the amount of ~~xxxxxxxxxxxxxxxx~~ (to be escalated from 1997 dollars to present day value).⁸ Id. at 95-96 (¶ 4.79). Because substituting the PFS proposed language for the last sentence of ¶ 4.79 would eliminate the requirement for PFS to have funding in place prior to beginning operations sufficient to cover a specific dollar amount -- and, therefore, would be in direct contravention of the Commission’s instructions in CLI-00-13 -- we decline to adopt the suggested PFS language.⁹

Seemingly acknowledging the possibility of an adverse Board ruling on its proposed language substitution, PFS alternatively requests that the Board reconsider and/or clarify its

⁸ Although we issued a separate decision regarding the adequacy of PFS decommissioning cost estimates, see Licensing Board Partial Initial Decision (Contention Utah S, Decommissioning) (May 27, 2003), per the table set forth in ¶ 4.58 of the contention Utah E/Confederated Tribes F partial initial decision, see LBP-05-21, 62 NRC at __ (slip op. at 86), we incorporated the PFS decommissioning cost estimates into the O&M costs to provide a unified figure as an aid to assessing future compliance with LC-2.

⁹ To be sure, the Commission’s August 2000 CLI-00-13 directive regarding a determination relative to the amount necessary to fund O&M predates the September 2000 MSA O&M cost pass-through mechanism. Nonetheless, to the extent PFS now considers that mechanism a basis for negating the Commission’s directive, this seems a matter best taken up with the Commission.

contention Utah E/Confederated Tribes F partial initial decision finding in ¶ 4.79 to require PFS to have service agreements in place sufficient to cover actual O&M and decommissioning costs for the size facility that it plans to build and operate, rather than a full-capacity, 4,000-cask facility. See PFS Reconsideration Motion at 6, 9. In this regard, PFS argues that the Commission’s decision in CLI-00-13, and LC-1 in particular, does not mandate that PFS build and operate a 4,000-cask facility, but rather permits it to build either a smaller facility or a full-capacity facility in phases. See id. at 9. Thus, PFS submits an alternative formula for calculating its initial O&M funding requirement that would separate the variable costs of the overpacks/casks, canisters, and rail fees (calculated on a per-unit basis and divided by two to reflect each of the twenty-year license terms) from the fixed O&M costs (also divided by two to reflect the two license terms), so that the amount of funding required to be covered by the customer service agreements pursuant to LC-2 would vary depending on the actual size of the facility PFS proposes to build. Additionally, the formula submitted by PFS would allow a downward adjustment of PFS variable O&M costs for any casks and canisters independently purchased by its customers as well as its Tooele County host payments for member and non-member casks. See id. at 10 n.10. PFS thus requests that the Board modify finding ¶ 4.79 to reflect its proposed formula as follows:

“PFS may not commence [operations before service agreements for the life of the license (i.e., twenty years) are in place with prices adequate to fund operations, maintenance, and decommissioning] in the amount of ~~XXXXXXXXXXXX~~ plus ~~XXXXXXXX~~ per spent fuel cask (not purchased by customers) to be stored at the facility ~~XXXXXXXXXXXX~~ (to be escalated from 1997 dollars to present day value) plus \$12 million for Tooele County host payments (adjusted for member and non-member casks).”

Id. at 10 (footnotes omitted).

In its response opposing the PFS reconsideration motion, the State challenges this PFS alternative formula, arguing that the Board should not consider any adjustment for cask and canister costs purchased independently by PFS customers and urging that the Board reject calculating the variable O&M costs on a per-unit basis over two license terms. See State Reconsideration Response at 9-10. Instead, the State asserts that because the bulk of the cask and canister costs (totaling \$1.911 billion for a 4,000-cask facility) would be incurred by PFS during the first twenty-year license term, LC-2 should be rewritten as follows:

In accordance with LBP-03-___, Findings ¶¶ 4.58, 4.79, PFS shall not commence facility operations unless it has in place service agreements covering the entire term of the license, with prices sufficient to cover the operations, maintenance, and decommissioning costs in the amount of \$1.911 billion (canisters and overpacks) plus ~~xxxxxxxxxxxx~~ (other operating and maintenance costs) plus \$12 million (Tooele County host payments). All of these costs are to be escalated from fourth quarter 1997 dollars to present day value in accordance with the factors in the model service agreement, MSA Schedule 5.

Id. at 11.

For its part, the staff supports reconsideration and/or clarification of this aspect of the Board's contention Utah E/Confederated Tribes F partial initial decision. Declaring that because the Commission allowed PFS to construct its facility in phases and was aware of the possibility that PFS would choose not to utilize its full capacity under the license, the staff argues that PFS need only have service agreements in place adequate to cover O&M and decommissioning costs for the size facility that PFS plans to operate initially. See Staff Response at 8. While the staff agrees with the general PFS proposition that the O&M cost calculation should be revised to account separately for fixed O&M costs and direct unit-dependent costs for storage casks, canisters, and rail fees, it rejects what it considers a new PFS argument for further deductions from the required demonstration of funding with

respect to customers who ship their own casks and canisters and host fee payments. See id. at 9. The staff also rejects the halving of direct-unit dependent O&M costs, as these costs vary with the number of casks at the facility and not with the number of years of the license. See id. at 9-10 & nn.13-14. In the staff's view, the finding in ¶ 4.79 of the Board's partial initial decision should be revised to require funding of PFS's fixed and other O&M costs (for a twenty-year license term), plus its per-unit costs (i.e., cask, canister, and rail fees) for the size facility to be operated initially. See id. at 10 n.15.

All three parties are in unanimous agreement that the Board's finding in ¶ 4.79, which calculated the requisite level of O&M funding based on the estimated operating costs of a full-capacity, 4,000-cask facility over a single twenty-year license term, should be reworded in some manner. As PFS and the staff correctly note, we recognized in our contention Utah E/Confederated Tribes F partial initial decision that if granted, the PFS license would authorize, but not require, PFS to possess up to 4,000 casks and that the facility, even at full capacity, would be constructed in phases. See, e.g., LBP-05-21, 62 NRC at __ (slip op. at 68-69, 85, 95) (¶¶ 4.23-4.25, 4.57, 4.78). Thus, consistent with LC-1, we agree in principle that PFS need not demonstrate that it has sufficient funding to cover all of the costs associated with operating a 4,000-cask facility up front, if it indeed decides to build the facility in phases or decides to build a less than full-capacity facility. We therefore find it appropriate to consider the fixed and other O&M costs (totaling **xxxxxxxxxxxx** over a twenty-year license term)¹⁰ separately from the cask, canister, and transportation costs that will vary depending on the

¹⁰ We derive this figure from the O&M cost estimates provided by PFS, which estimated the costs of a 4,000-cask facility over the anticipated forty-year lifetime of the facility minus the canister costs (\$1,302,200,000), the overpack costs (\$608,800,000), and the rail fees (**xxxxxxxxxxxx**). See LBP-05-21, 62 NRC at __ (slip op. at 86) (¶ 4.58).

initial size of the facility. Accordingly, we calculate the cost (including cask, canister, and transportation costs) of each unit to be **xxxxxxx**.¹¹ However, because the record before us is replete with references to PFS constructing a minimum initial capacity facility of **xxxxxxxxxx** **xx** relative to LC-1,¹² we find it appropriate to require PFS to have service agreements in place with prices to cover the O&M costs of, at a minimum, a **xxxxxxxxxx** facility. If PFS elects to specify a minimum initial capacity other than **xxxxxxxxxx** as part of its demonstration of compliance with LC-1, the requisite level of funding may be adjusted to reflect the actual initial size of the facility.¹³

¹¹ We likewise derive this figure from the O&M cost estimates provided by PFS, i.e., canister costs of \$1,302,200,000 plus overpack costs of \$608,800,000 plus rail fees of **xxxxxxxxxxxxx**/4000 casks. See id. at 86 (¶ 4.58). We have elected not to divide this figure in half as PFS would have it because, as the staff points out, see Staff Reconsideration Response at 10, the per-unit costs vary with the number of casks used at the facility and not with the number of years of the license.

¹² See, e.g., Testimony of John Parkyn on [PFS Facility] Construction Costs -- Contention Utah E/Confederated Tribes F (fol. Tr. at 1845) at 4; Tr. at 2026, 2027; [PFS] Proposed Findings of Fact and Conclusions of Law on Contentions Utah E/Confederated Tribes F and Utah S (July 31, 2000) at 20 (**xxxxxxxxxxxxx** minimum planned initial storage capacity).

¹³ In this regard, we note that in the proceeding concurrently before the Licensing Board chaired by Administrative Judge Farrar involving contention Utah K, Credible Accidents, PFS filed a motion requesting reconsideration of LBP-03-4, 57 NRC 69 (2003). In that motion, PFS argued that the Farrar Board should have ruled that the license could be issued subject to a condition limiting the size of the facility such that the aircraft crash hazard would remain below the Commission's safety criterion (i.e., limiting the size to a 336-cask facility). During the oral argument on the motion, PFS indicated that its intention was to begin constructing a 336-cask facility as an interim step to continuing to pursue a license for a full-size, 4,000-cask facility. See Tr. at 13,757. The PFS motion was denied by the Board on procedural grounds without prejudice to PFS seeking such a sizing limitation through appropriate means. See id. at 13,857, 13,861; see also LBP-03-30, 58 NRC __, __ (slip op. at 1 n.1) (Dec. 31, 2003). Since the Farrar Board's May 2003 ruling on that reconsideration motion, PFS has not further pursued limiting the size of the facility to 336 (or any other number of) casks through a license application amendment or any other appropriate means.

Thus, we grant the pending PFS motion to the extent it requests reconsideration and/or clarification of the dollar amount specified in ¶ 4.79. We hereby revise ¶ 4.79 of our contention Utah E/Confederated Tribes F partial initial decision in its entirety to read as follows:¹⁴

In conclusion, we find that in accordance with 10 C.F.R. § 72.22(e)(2), PFS has reasonably estimated the costs of operation and maintenance over the forty-year planned life of the facility, with the exception of a \$24 million Tooele County, Utah host payment understatement. In accordance with the Commission's instructions in CLI-00-13, the Board finds that PFS may not commence operations before service agreements for the life of the license (i.e., twenty years) are in place with prices adequate to fund operations, maintenance, and decommissioning²¹ for an initial xxxxxxxxxxxx capacity facility in the amount of xxxxxxxxxxxx. This figure reflects xxxxxxxxxxxx for cask, canister, and rail costs (xxxxxxxxx per unit x xxxxxxxxxxxx), plus xxxxxxxxxxxx for fixed and other O&M costs over a twenty-year license term, plus \$12 million for Tooele County host payments. All costs are to be escalated from 1997 dollars to present value. Should the initial capacity of the facility as appropriately specified by PFS differ from xxxxxxxxxxxx, the above amount may be adjusted according to the actual number of casks to be used.

²¹ Although we issue a separate decision today regarding the adequacy of the PFS efforts regarding decommissioning cost estimates, see LBP-05-22, 62 NRC __, __ (May 27, 2003) (slip op. at 41-52), per the table in section IV.F.1 above we incorporate the PFS decommissioning costs estimates in this figure to provide a unified figure as an aid to assessing future compliance with LC-2.

III. CONCLUSION

Finding sufficient justification to warrant (1) clarification of license conditions LC-1 and LC-2 applicable to PFS so as to adopt the wording as endorsed or reworded by the

¹⁴ Because the PFS request for further adjustment of the Tooele County host payment to reflect member and non-member casks constitutes a new argument not previously presented to the Board, we decline to permit any deduction from the \$12 million figure.

Commission in CLI-00-13; and (2) reconsideration of the O&M dollar amount specified in ¶ 4.79 of our May 27, 2003 partial initial decision regarding contention Utah E/Confederated Tribes F, we grant the pending PFS reconsideration/clarification motion in those respects. Further, because we find that not establishing a specific dollar amount that the PFS service agreements must cover would be inconsistent with the Commission directive in CLI-00-13, 52 NRC at 36, we deny the PFS motion in that regard.

For the foregoing reasons, it is this fifth day of January 2004, ORDERED, that:

1. The June 6, 2003 PFS motion for reconsideration/clarification of the Board's May 27, 2003 summary disposition ruling, LBP-05-20, 62 NRC __ (May 27, 2003), and its partial initial decision that same date regarding contention Utah E/Confederated Tribes F, LBP-05-21, 62 NRC __ (May 27, 2003), is granted in part and denied in part in accordance with the Board determinations set forth in section II.B of this memorandum and order.

2. Given previous party positions suggesting that financial assurance-related information may include proprietary or other sensitive data, on or before Tuesday, January 20, 2004, 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 Friday, January 30, 2004.

THE ATOMIC SAFETY
AND LICENSING BOARD¹⁵

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Jerry R. Kline
ADMINISTRATIVE JUDGE

/RA/

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

January 5, 2004

¹⁵ 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 two above. See Licensing Board Memorandum and Order (Notice Regarding Issuance Concerning Reconsideration/Clarification Motion) Contentions Utah E/Confederated Tribes F and Contention Utah S) (January 5, 2004) (unpublished).

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-05-23-REDACTED VERSION OF LB MEMORANDUM AND ORDER (GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSIDERATION AND/OR CLARIFICATION OF FINANCIAL QUALIFICATIONS DECISIONS) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
G. Paul Bollwerk, III, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Sherwin E. Turk, Esquire
Laura C. Zaccari, Esquire
John T. Hull, Esquire
Darani M. Reddick, Esquire
Office of the General Counsel
Mail Stop - 0-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Peter S. Lam
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Stephen L. Simpson, Esquire
Office of the Solicitor
Department of the Interior
Division of Indian Affairs
1849 C Street, NW, Mailstop 6456-MIB
Washington, DC 20240

Diane Curran, Esquire
Harmon, Curran, Spielberg
& Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036

Joro Walker, Esquire
Director, Utah Office
Western Resource Advocates
1473 South 1100 East, Suite F
Salt Lake City, UT 84105

Martin S. Kaufman, Esquire
Atlantic Legal Foundation
205 E. 42nd St.
New York, NY 10017

Docket No. 72-22-ISFSI
LBP-05-23-REDACTED VERSION OF LB MEMORANDUM
AND ORDER (GRANTING IN PART AND DENYING IN PART
MOTION FOR RECONSIDERATION AND/OR CLARIFICATION
OF FINANCIAL QUALIFICATIONS DECISIONS)

Denise Chancellor, Esquire
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, UT 84114

Jay E. Silberg, Esquire
D. Sean Barnett, Esquire
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1128

John Paul Kennedy, Sr., Esquire
David W. Tufts, Esquire
Confederated Tribes of the Goshute
Reservation and David Pete
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, UT 84105

Richard Wilson
Department of Physics
Harvard University
Cambridge, MA 02138

Tim Vollmann, Esquire
3301-R Coors Road N.W., #302
Albuquerque, NM 87120

Paul C. EchoHawk, Esquire
ECHOHAWK LAW OFFICES
151 North 4th Avenue, Suite A
P.O. Box 6119
Pocatello, ID 83205-6119

Joseph R. Egan, Esquire
Martin G. Malsch, Esquire
Egan, Fitzpatrick, Malsch & Cynkar, PLLC
The American Center at Tysons Corner
8300 Boone Boulevard, Suite 340
Vienna, VA 22182

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

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