

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S RESPONSE TO
"STATE OF UTAH'S BRIEF TO THE COMMISSION
REGARDING THE LICENSING BOARD'S GRANT OF
SUMMARY DISPOSITION OF BASES UNDER UTAH
CONTENTION E/CONFEDERATED TRIBES CONTENTION F"

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April 17, 2000

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I. INTRODUCTION

Pursuant to the Commission's "Order" of March 24, 2000, the NRC Staff ("Staff") herewith responds to the "State of Utah's Brief to the Commission Regarding the Licensing Board's Grant of Summary Disposition of Bases Under Utah Contention E/Confederated Tribes Contention F" ("Utah Brief" or "Br."), filed on April 5, 2000. In its Brief, the State of Utah ("State") asserts that the Commission should undertake review of and reverse LBP-00-06, in which the Licensing Board (a) summarily disposed of numerous subissues in Contention Utah E/Confederated Tribes F, and (b) referred its ruling to the Commission under 10 C.F.R. § 2.730(f).¹ For the reasons set forth below, the Staff submits that the Commission should undertake review of, and affirm, the Licensing Board's decision.

¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-06, 51 NRC ___, ("Memorandum and Order Granting in Part, Denying in Part, and Referring Ruling on Summary Disposition Regarding Contention Utah E/Confederated Tribes F") (slip op., March 10, 2000).

II. BACKGROUND

Contention Utah E/Confederated Tribes F asserts that Private Fuel Storage, L.L.C. (“Applicant” or “PFS”) has failed to demonstrate that it is financially qualified to construct and operate its proposed independent spent fuel storage installation (“ISFSI”), as required under 10 C.F.R. §§ 72.22(e) and 72.40(a)(6):

Utah E/Confederated Tribes F -- Financial Assurance.

Contrary to the requirements of 10 C.F.R. §§ 72.22(e) and 72.40(a)(6), the Applicant has failed to demonstrate that it is financially qualified to engage in the Part 72 activities for which it seeks a license it that:

1. The information in the application about the legal and financial relationship among the owners of the limited liability company (i.e., the license Applicant PFS) is deficient because the owners are not explicitly identified, nor are their relationships discussed. See 10 C.F.R. §§ 50.33(c)(2) and 50.33(f) and Appendix C, § II of 10 C.F.R. Part 50.
2. PFS is a limited liability company with no known assets; because PFS is a limited liability company, absent express agreements to the contrary, PFS's members are not individually liable for the costs of the proposed PFSF, and PFS's members are not required to advance equity contributions. PFS has not produced any documents evidencing its members' obligations, and thus, has failed to show that it has a sufficient financial base to assume all obligations, known and unknown, incident to ownership and operation of the PFSF; also, PFS may be subject to termination prior to expiration of the license.
3. The application fails to provide enough detail concerning the limited liability company agreement between PFS's members, the business plans of PFS, and the other documents relevant to assessing the financial strength of PFS. The Applicant must submit a copy of each member's Subscription Agreement, see 10 C.F.R. Part 50, App. C., § II, and must document its funding sources.

4. To demonstrate its financial qualifications, the Applicant must submit as part of the license application a current statement of assets, liabilities and capital structure, *see* 10 C.F.R. Part 50, Appendix C, § II.
5. The Applicant does not take into account the difficulty of allocating financial responsibility and liability among the owners of the spent fuel nor does it address its financial responsibility as the “possessor” of the spent fuel casks. The Applicant must address these issues. *See* 10 C.F.R. § 72.22(e).
6. The Applicant has failed to show that it has the necessary funds to cover the estimated costs of construction and operation of the proposed ISFSI because its cost estimates are vague, generalized, and understated. *See* 10 C.F.R. Part 50, App. C, § II.
7. The Applicant must document an existing market for the storage of spent nuclear fuel and the commitment of sufficient number of Service Agreements to fully fund construction of the proposed ISFSI. The Applicant has not shown that the commitment of 15,000 MTUs is sufficient to fund the Facility including operation, decommissioning and contingencies.
8. Debt financing is not a viable option for showing PFS has reasonable assurance of obtaining the necessary funds to finance construction costs until a minimum value of service agreements is committed and supporting documentation, including service agreements, are provided.
9. The application does not address funding contingencies to cover on-going operations and maintenance costs in the event an entity storing spent fuel at the proposed ISFSI breaches the service agreement, becomes insolvent, or otherwise does not continue making payments to the proposed PFSF.
10. The Application does not provide assurance that PFS will have sufficient resources to cover non-routine

expenses, including without limitation the costs of a worst case accident in transportation, storage, or disposal of the spent fuel.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-07, 47 NRC 142, 251-52 (1998).²

On December 3, 1999, the Applicant filed a motion seeking summary disposition of subparts 1-5 and 7-10 of this contention, based in part on its commitment to postpone construction and operation of the facility until it has obtained certain financial agreements from its members, customers, and/or lenders.³

On December 15, 1999 (as revised and reissued on January 4, 2000), the Staff issued its site-related Safety Evaluation Report ("SER") for the facility, in which it found the Applicant to be financially qualified to construct and operate the facility based, in part, upon two license conditions which it proposed,⁴ similar to the conditions set forth in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997) (hereinafter cited as "*Claiborne*"). The proposed conditions would require as follows:

LC17-1. 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

² The Licensing Board consolidated this contention with portions of Castle Rock Contention 7. See LBP-98-07, 47 NRC at 187, 214-15. Those issues remained in the contention following the withdrawal of the Castle Rock intervenors. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-06, 49 NRC 114, 119-20 (1999).

³ "Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F," dated December 3, 1999.

⁴ Letter from Mark S. Delligatti (NRC) to John D. Parkyn (PFS), dated December 15, 1999 (corrected and reissued January 4, 2000), enclosing "Safety Evaluation Report of the Site-Related Aspects of the Private Fuel Storage Facility [ISFSI]."

additional capacity beyond this initial capacity amount shall commence only after funding is fully committed that is adequate to construct such additional capacity.

LC17-2. 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.

SER at 17-7. On December 22, 1999, the Staff filed its response to the Applicant's motion for partial summary disposition, in which it reiterated its view that the Applicant is financially qualified to construct and operate the facility based, in part, on the Staff's proposed license conditions and the Commission's decision in *Claiborne*.⁵ On December 27, 1999, the State filed its response in opposition to the Applicant's motion; and on January 10, 2000, the State filed its reply to the Staff's response to the Applicant's motion.⁶

On March 10, 2000, the Licensing Board issued its decision in LBP-00-06, in which it granted summary disposition of all portions of this contention other than Basis 6 (construction and operating costs) and part of Bases 5 and 10 (on-site liability insurance), finding that there no longer existed a genuine issue of material fact concerning those aspects of the Applicant's financial qualifications, based on the Staff's proposed license conditions LC17-1 and LC17-2 (set forth *supra*, at 5) and the Applicant's commitments to:

1. Incorporate into its customer service agreements (member and nonmember) provisions that mandate:

⁵ See "NRC Staff's Response to Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F," dated December 22, 1999.

⁶ See "State of Utah's Response to the Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F," dated December 27, 1999; and "State of Utah's Reply to the Staff's Response to the Applicant's Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes Contention F," dated January 10, 2000.

- a. PFS will not voluntarily terminate before it has provided all agreed upon spent fuel storage services as required in the service agreements, it has completed its licensing and regulatory obligations under its license, and the license is terminated;
 - b. An assignment of legal and financial responsibility between the customer, as the owner of the spent fuel, and PFS, including an acknowledgment that each customer must retain title to its fuel throughout the storage period;
 - c. Customers will be required to (i) periodically provide pertinent financial information; (ii) meet creditworthiness requirements; and (iii) provide PFS with any necessary additional financial assurances (e.g., an advance payment, irrevocable letters of credit, third-party guarantee, or payment and performance bond); and
2. obtain an offsite liability policy in the amount of \$200 million, i.e., a policy that matches the largest commercially available offsite insurance coverage available.

LBP-00-06, slip op. at 72-73.⁷ The Licensing Board then referred its ruling to the Commission under 10 C.F.R. § 2.730(f), recognizing that (a) central to its decision is a legal question as to the proper interpretation and application of 10 C.F.R. § 72.22(e), in light of the Commission's financial assurance decision in *Claiborne*, and (b) the Commission has encouraged the Licensing Boards to refer "novel legal or policy questions . . . to the

⁷ While the Licensing Board recited these PFS commitments in support of its decision, it did not impose them as license conditions.

Commission as early as possible in the proceeding.” *Id.* at 70-72, *citing Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998).⁸

III. ARGUMENT

A. Interlocutory Review of the Licensing Board’s Ruling Is Not Warranted Under 10 C.F.R. § 2.786(g), But May Be Undertaken Pursuant to the Commission’s Statement of Policy in CLI-98-12.

The Licensing Board has referred its decision to the Commission, pursuant to 10 C.F.R. § 2.730(f), which provides for the referral of rulings where a Licensing Board finds that a “prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense.” LBP-00-06, slip op. at 70. In accordance with 10 C.F.R. § 2.786(g), the Commission may undertake review of a referred ruling, where the ruling either (1) threatens a party with “immediate and serious irreparable impact which, as a practical matter, could not be alleviated” by a petition for review of the Board’s final decision, or (2) “affects the basic structure of the proceeding in a pervasive or unusual manner.”

In its Brief, the State asserts that the Licensing Board’s ruling will have a “pervasive and unusual impact on the proceeding,” in that it “denies the State its right to a hearing on issues that go to the core of the Applicant’s financial qualifications to construct, operate, and decommission an ISFSI.” According to the State, in the absence of immediate Commission review, “the State will not have an opportunity to demonstrate that it is entitled to a hearing on this matter until after a license has been issued” (Utah Br. at 4). While the State correctly states that the Licensing Board’s decision “go[es] to the core of the

⁸ Upon issuing its decision in LBP-00-06, the Licensing Board also denied the State’s request to amend the bases for this contention, for failure to satisfy the basis and specificity requirements of 10 C.F.R. § 2.714(b)(2). *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-07, 51 NRC ____ (March 10, 2000).

Applicant's financial qualifications" (*Id.*), it is incorrect in asserting that absent immediate review, the State would be unable to contest the Board's decision until after a license has issued. Thus, an initial decision authorizing the issuance of a license for an away-from-reactor ISFSI may only become effective "upon order of the Commission," and the Staff may not issue a license for such a facility "until expressly authorized to do so by the Commission." *See* 10 C.F.R. § 2.764(c); *see also* 10 C.F.R. § 72.46(d). Accordingly, there is no reason to believe the State would be unable to challenge the Board's decision prior to issuance of a license.

Further, the Licensing Board's decision does not appear to have any "pervasive" or "unusual" effect on the proceeding; nor has the State asserted that the Board's decision threatens it with "immediate and serious" harm that could not be alleviated by a petition for Commission review of a final decision in the proceeding. The Board's ruling resolves one set of issues among the many issues that have been raised in this proceeding. Even if the Commission should ultimately determine to reverse the Board's decision, the only impact on the proceeding will be that discovery would be reopened and litigation would resume -- just as it would on any contention that the Commission finds has been incorrectly rejected or resolved. The fact that the Board's ruling may be "novel" or "important" does not alter this conclusion, absent a change to the basic structure of the proceeding. *See, e.g., Sequoyah Fuels Corp.* (Gore, Oklahoma, Site), CLI-94-11, 40 NRC 55, 63 (1994). Accordingly, the Board's decision does not warrant review under the criteria set forth in 10 C.F.R. § 2.786(g).

Notwithstanding this conclusion, the Staff recognizes that the Commission may choose to exercise its inherent supervisory authority to undertake review of the Licensing Board's ruling. As noted by the Board, the Commission recently encouraged the Boards to certify "novel legal or policy questions relating to admitted issues to the Commission as early as possible." See LBP-00-06, slip op. at 71, *quoting* CLI-98-12, 48 NRC at 23. The Licensing Board's ruling constitutes a decision of "first impression" (see Utah Br. at 5), in that it is the first decision to interpret the financial assurance requirements of 10 C.F.R. Part 72 and to apply the Commission's *Claiborne* decision outside the Part 70 context. Accordingly, review of the Licensing Board's referred ruling would appear to be appropriate under the Commission's Policy Statement in CLI-98-12.⁹

B. The Licensing Board's Decision Properly Interprets and Applies the Financial Assurance Requirements of 10 C.F.R. Part 72.

In its decision, the Licensing Board determined that the financial assurance requirements in 10 C.F.R. Part 72 may be satisfied by the imposition of license conditions which, *inter alia*, prohibit the commencement of construction or operation prior to the receipt of specific financial commitments that assure the safe construction, operation and decommissioning of the facility. See LBP-00-06, slip op. at 31. This decision is consistent with the Commission's previous guidance in this proceeding, set forth in *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36-37 (1998). There, the Commission (a) upheld the Licensing Board's view that the

⁹ In addition, prompt Commission review would appear to be appropriate under 10 C.F.R. § 2.730(f), "to prevent detriment to the public interest or unusual delay or expense," in order to confirm whether the Applicant's financial qualifications may rest upon its commitments and license conditions or whether specific financial information and commitments must be obtained prior to licensing, as the State contends.

Part 50 financial assurance requirements “are not applicable *in toto* to Part 72 ISFSI applicants, but should be used as guidance” to assess PFS’ financial qualifications in this proceeding, and (b) encouraged the use of license conditions in this proceeding to satisfy the Part 72 financial assurance requirements, just as license conditions had been relied upon in *Claiborne* for a finding of financial assurance under the Commission’s Part 70 requirements.¹⁰ As more fully set forth below, the Staff submits that the Licensing Board properly followed the Commission’s guidance in CLI-98-13 and the Commission’s *Claiborne* decision, in resolving this contention.

¹⁰ In CLI-98-13, in commenting upon this contention, the Commission observed that the Part 50 financial assurance requirements “do not necessarily apply outside the reactor context.” The Commission cited its *Claiborne* decision, and stated:

. . . The parties and the Board may wish to consider the feasibility of license conditions in this proceeding and the possibility that appropriate conditions might avoid difficult litigation over financial issues.

Our financial qualifications standards and other licensing regulations do not require the Board to undertake a full-blown inquiry into an applicant’s likely business success See [Claiborne, 46 NRC] at 308. To the maximum extent practicable, both the NRC Staff, in its safety and environmental reviews, and the Board, in its adjudicatory role, should avoid second-guessing private business judgments.

Id., 48 NRC at 36-37; emphasis added. While the State makes reference to CLI-98-13 (see Utah Br. at 8), it omits any mention of the Commission’s explicit guidance that the Board and parties should consider the use of financial assurance license conditions in this Part 72 proceeding, and that NRC regulations do not require the Board to conduct “a full-blown inquiry into the applicant’s likely business success.” CLI-98-13, 48 NRC at 36.

1. The Licensing Board Correctly Interpreted the Financial Assurance Requirements in 10 C.F.R. Part 72.

The Commission's financial assurance requirements applicable to an ISFSI are set forth in 10 C.F.R. § 72.22(e). That regulation states as follows:

§ 72.22 Contents of application: General and financial information. Each application must state: . . .

(e) . . . information sufficient to demonstrate to the Commission the financial qualifications of the applicant to carry out, in accordance with the regulations in this chapter, the activities for which the license is sought. . . . The information must show that the applicant either possesses the necessary funds, or that the applicant has reasonable assurance of obtaining the necessary [] funds or that by a combination of the two, the applicant will have the necessary funds available to cover the following:

- (1) Estimated construction costs;
- (2) Estimated operating costs over the planned life of the ISFSI; and
- (3) Estimated decommissioning costs, and the necessary financial arrangements to provide reasonable assurance prior to licensing that decommissioning will be carried out after the removal of spent fuel and/or high-level radioactive waste from storage.¹¹

In its decision, the Licensing Board compared these regulatory requirements with the financial assurance requirements set forth in 10 C.F.R. § 50.33(f) and § 70.23(a) -- which apply, respectively, to nuclear reactors and activities involving special nuclear material. See LBP-00-06, slip op. at 22-30. The Board observed that the language of § 72.22(e) differs from the language of both § 50.33(f) and § 70.23(a); and it reviewed the Commission's discussion of regulatory history in *Claiborne*, where the Commission stated that its rule changes in 1968 "‘had the effect of breaking any link that existed’ between

¹¹ In addition, 10 C.F.R. § 72.40(a)(6) requires a finding by the Commission that an ISFSI applicant, other than the U.S. Department of Energy (DOE), "is financially qualified to engage in the proposed activities in accordance with the regulations in [Part 72]."

reactor and materials applicants,” establishing more stringent requirements for reactor applicants. *Id.* at 23-25. While the Board noted that the Part 50 and Part 72 requirements contain some similar language, it further observed that the Part 72 requirements were adopted without specific reference to Part 50 and are less detailed than the Part 50 requirements. *Id.* at 25. Accordingly, the Board concluded, “as the Commission found in *Claiborne*, that there is no reason to apply the financial qualifications requirements of Part 50 in this Part 72 proceeding in toto, although there may be some parallels in appropriate circumstances.” *Id.* at 26. In reaching these determinations, the Board’s analysis followed the Commission’s regulatory analysis in *Claiborne*. See CLI-97-15, 46 NRC at 299-302.

In challenging these conclusions, the State argues that the Licensing Board erred in its interpretation of 10 C.F.R. § 72.22(e) and in its determination of applicable guidance, by (a) “effectively equat[ing] the Part 70 and Part 72 regulations, despite significant differences in their plain language and regulatory history,” and (b) concluding that the risk posed by the PFS facility is “more comparable to a uranium enrichment plant than a nuclear power plant, such that measures more stringent than commitments by the applicant and license conditions were not warranted” (Utah Br. at 9). Further, the State asserts that the Licensing Board erred in ignoring the “guidance” provided by 10 C.F.R. Part 50 (*Id.* at 8). These assertions are without merit.

First, the Licensing Board did not equate the Part 70 and Part 72 requirements. On the contrary, the Board explicitly recited the applicable provisions of Parts 50, 70 and 72, and noted that the language of Parts 50 and 72 “have some of the same general language.” LBP-00-06, slip op. at 25. The Board properly found, however, that the similarity in language between the Part 50 and Part 72 regulations was not controlling, in view of the

differences between their specific requirements, the fact that Part 72 was adopted without specific reference to Part 50, and the fact that the information required under Part 72 “is much less detailed than that demanded by Part 50.” *Id.*

While the State contends that the Board should have applied the Part 50 requirements, due to similarities in the “reasonable assurance” language in Parts 50 and 72 (Utah Br. at 9-10), this fact lacks the significance claimed by the State. As the Board noted, Part 50 requires specific information to be provided by a reactor applicant, while Part 72 contains much less detail as to the type of financial information that is required for an ISFSI (see LBP-00-06, slip op. at 25).¹² In sum, the Commission has not required an ISFSI applicant to submit the detailed information that is required for a nuclear reactor.¹³

Moreover, contrary to the State’s assertion, the Licensing Board did not disregard or “nullify” the “reasonable assurance” standard stated in Part 72 (Utah Br. at 12 n.12); rather, its ruling establishes that the financial assurance regulations in Part 72 may be satisfied through the adoption of license conditions, which provide reasonable assurance

¹² See, e.g., 10 C.F.R. § 50.33(f), and 10 C.F.R. Part 50, Appendix C. As the State “admit[s]” (Utah Br. at 11 n.11), these requirements are not restated in the regulations applicable to an ISFSI under 10 C.F.R. Part 72.

¹³ The State cites the Commission’s statement that “[e]xperience with licensing actions under [Part 70] demonstrated the need for a more definitive regulation to cover spent fuel storage in an ISFSI.” Utah Br. at 10 n.10, *citing* Statement of Consideration, “Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation,” 45 Fed. Reg. 74,693 (1980). That statement, however, was general in nature, and was not made in the context of the financial assurance regulations; indeed, financial assurance is not mentioned in the Statement of Consideration.

that “the applicant will have the necessary funds to cover” the estimated construction, operating, and decommissioning costs, as required by § 72.22(e).¹⁴

The State asserts that while the Licensing Board and the Commission have both indicated that the financial assurance regulations in Part 50 provide guidance for interpreting the Part 72 financial assurance requirements -- recognizing that “the Part 50 regulations are not applicable ‘in toto’ and ‘do not necessarily apply outside the reactor context,’” the Board failed to apply “any of the guidance in the Part 50 regulations” (Utah Br. at 8, *citing PFS*, CLI-98-[12], 48 NRC at 36; LBP-00-06, slip op. at 25).¹⁵ This assertion is without merit. While the Part 50 requirements may serve as “guidance” in a Part 72 proceeding, that does not preclude the consideration of alternative methods, such as the use of commitments and binding license conditions, to provide assurance that an applicant will obtain the funds required for safe construction, operation and decommissioning of the

¹⁴ There is no basis for the State’s assertion that the Board’s ruling potentially affects the phrase “reasonable assurance” wherever it occurs in the regulations since “[u]nder this standard, any party could obtain a license merely by stating a subjective intention to comply with the NRC’s body of safety regulations at some time in the future” (Utah Br. at 12 n.12). The imposition of a license condition constitutes a binding legal requirement, which differs significantly from an applicant’s statement of its “subjective intention” to comply with Commission requirements. *Id.* Further, the Board’s ruling only concerns § 72.22(e), and does not address other regulations; the showing required to provide “reasonable assurance” under other regulations is not affected by this interpretation. Finally, the Commission’s regulations explicitly contemplate the imposition of license conditions to assure compliance with Commission requirements. *See, e.g.*, 10 C.F.R. §§ 50.50, 72.44(a).

¹⁵ As the State recognizes (Utah Br. at 8), the regulatory history of Part 72 does not contain guidance as to how an ISFSI applicant may demonstrate it has reasonable assurance of obtaining the funds needed to construct and operate an ISFSI.

facility.¹⁶ Accordingly, the Board committed no error in not applying the Part 50 requirements in this proceeding.

Second, while the State asserts that the Licensing Board erred in failing to recognize the risk posed by the nature of the PFS facility (Utah Br. at 13-15), the Board expressly considered and rejected this argument. The Board noted that “[a]lthough the State asserts that the health and safety concerns involved with a Part 72 facility are more on a par with a power reactor than an enrichment facility, the Commission has previously indicated otherwise.” LBP-00-06, slip op. at 27. As the Board found, the Commission has stated that “the public health and safety risks posed by ISFSI storage . . . are very different from the risks posed by the safe irradiation of the fuel assemblies in a commercial nuclear reactor” due to the lower temperature, pressure, radioactivity, and likelihood of accidents involving a major release of radioactivity from spent fuel in an ISFSI.¹⁷

Further, there is no merit in the State’s argument that the proposed size of the PFS facility (up to 40,000 MTUs) renders it “fundamentally more hazardous than the uranium enrichment plant addressed in the *Claiborne* decision, and therefore, warrants a more

¹⁶ While the State quotes the Commission’s observation that a power reactor licensee in financially straitened circumstances may be under increased pressure “to commit safety violations or take safety ‘shortcuts’ than one in good financial shape” (Utah Br. at 7), this concern is misplaced here, where license conditions have been proposed to require adequate funding prior to the commencement of construction and/or operation, and additional funding if the facility is expanded. See LBP-00-06, slip op. at 14-15.

¹⁷ LBP-00-06, slip op. at 27-29, *quoting* Statement of Consideration, “Interim Storage of Spent Fuel in an Independent Spent Fuel Storage Installation at a Reactor Site; . . .”, 60 Fed. Reg. 20,879 (1995). See *also*, Statement of Consideration, “Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation,” 45 Fed. Reg. 74,693, 74,694, 74,695 (1980) (noting the reduced temperature, pressure, and radioactivity of spent fuel stored in an ISFSI, and stating that “the storage of spent fuel in an ISFSI is a low risk operation provided the ISFSI is designed, constructed and operated in accordance with required standards.”).

stringent financial qualifications review” (Utah Br. at 13). Even if the State is correct, this argument suggests that the appropriateness of a license condition under 10 C.F.R. § 72.22(e) should be evaluated according to the risk posed by a specific facility, and that such license conditions are not impermissible “*ab initio*” under 10 C.F.R. § 72.22(e). See LBP-00-06, slip op. at 31.

Finally, there is no merit in the State’s assertions that the Licensing Board erred in citing the Commission’s finding in *Claiborne* that the NRC’s inspection and enforcement tools contribute to the assurance that public health and safety will not be jeopardized (Utah Br. at 14, citing LBP-00-06, slip op. at 29-30).¹⁸ The State has provided no reason to believe that the Commission’s oversight would be any less useful for this facility than for any other facility licensed by the Commission.¹⁹

2. The Licensing Board Did Not Improperly Delegate Material Licensing Issues to the Staff for Post-Hearing Resolution.

In its decision, the Licensing Board disposed of various issues concerning the Applicant’s means of funding the costs of construction and operation, based on the Applicant’s commitments and proposed license conditions (similar to the conditions that were imposed by the Commission in *Claiborne*), finding that the Applicant’s compliance with

¹⁸ As the Board noted, the Commission stated that “during the entire course of operation, the Commission’s inspection and enforcement tools provide further assurance that operation will not jeopardize public health and safety.” *Claiborne*, 46 NRC at 307-08.

¹⁹ The State also argues that once fuel is on-site, it cannot easily be returned to the reactor licensee, and “many reactors storing fuel at PFS will be decommissioned either prior to storing fuel at PFS or during the PFS license term” (Utah Br. at 14 n.13). These concerns, however, address the nature and adequacy of the license conditions that are imposed, rather than the issue of whether a reasonable assurance finding may rely on license conditions; moreover, these concerns were addressed in the Board’s decision. See, e.g., LBP-00-06, slip op. at 49-50, 72-73.

those conditions and commitments could be left for post-licensing verification by the Staff. LBP-00-06, slip op. at 29-30. Significantly, however, the Board left in place for further litigation the issues raised by the State (in subpart 6 of the contention) concerning the anticipated cost of facility construction and operation; nor did the Applicant seek summary disposition of this issue. See *id.* at 44, 65. In leaving that portion of the contention undisturbed, the Board left for hearing all issues concerning the costs which the Applicant's funding must cover.

In challenging the Licensing Board's decision, the State asserts that by accepting "prospective commitments and license conditions" to resolve the contested issues raised in Contention Utah E concerning the Applicant's satisfaction of 10 C.F.R. § 72.22(e), the Licensing Board "effectively waived the financial qualifications regulations for PFS and violated the State's right to an evidentiary hearing under §189a of the Atomic Energy Act" (Utah Br. at 2). The State contends that the Board's decision has the effect of deferring "the resolution of material licensing issues to post-licensing enforcement of license conditions" (*id.*), and that the decision violates "the State's right to a prior hearing on all financial issues material to the licensing decision" (*id.* at 16). These assertions are without merit.

The Licensing Board explicitly considered and rejected the State's assertion that it would be deprived of an opportunity to litigate material issues of fact by the Board's reliance on license conditions and the Staff's post-licensing verification that the conditions are satisfied. The Board rejected the State's "attempts . . . to discount the *Claiborne* decision's reliance on the availability of staff post-licensing inspection and enforcement activities relative to applicant commitments or license conditions as a basis upon which to

rest a finding of reasonable assurance.” LBP-00-06, slip op. at 29. The Board considered the State’s argument that previous agency decisions indicate that “post-licensing resolution can only be utilized sparingly,”²⁰ but found that, “[i]n the context of financial assurance for nonpower reactor facilities, however, the Commission in *Claiborne* appears to have taken a broader view of the matter.”²¹ The Board concluded (slip op. at 31):

In light of the Commission’s *Claiborne* decision, we do not find compelling the State’s concerns that allowing the PFS commitments and the staff’s proposed license conditions to provide the basis for a reasonable assurance finding is an improper waiver of the 10 C.F.R. Part 72 financial qualifications standards or an undue infringement on the State’s right to litigate material issues bearing on the PFS licensing decision.²²

The Licensing Board’s reliance upon these license conditions, which ultimately will be subject to Staff verification, is consistent with the Commission’s decision in *Claiborne* where similar license conditions were imposed and compliance with those conditions was left for post-licensing verification by the Staff. *Claiborne*, 46 NRC at 308-09. Similarly, the Board’s ruling is consistent with other decisions which have concluded that post-licensing verification does not constitute an improper delegation of decisional responsibility over

²⁰ See LBP-00-06, slip op. at 30, commenting on *Consolidated Edison Co. of New York, Inc.* (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 952 (1974) and *Public Service of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313 (1978).

²¹ *LBP-00-06*, slip op. at 30, citing CLI-97-15, 47 NRC at 308 (agency’s “inspection and enforcement tools provide further assurance” that the public health and safety would not be jeopardized) and 306-07 (“NRC inspections and enforcement action go a long way toward ensuring compliance with our requirements”).

²² The Board further found that the Staff’s “ongoing inspection and enforcement responsibilities go a long way in addressing a principal State concern in this proceeding, i.e., the implications of reactor decommissioning either prior to sending fuel to the PFS site or during the PFS license term.” LBP-00-06, slip op. at 31 n.5.

contested issues to the Staff, if the Board has made the basic findings required for issuance of the license. *See, e.g., Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103-04 (1983) (post-licensing verification of siren installation and testing, completion of letters of agreement, implementing procedures and other matters did not preclude a “reasonable assurance” finding); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1159 (1984) (Staff confirmation that the applicant had upgraded or isolated its non-safety related equipment); *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-87-11, 25 NRC 287, 297-98 (1987) (delegating to the Staff responsibility to review and approve future changes to a licensee’s incomplete plan to design, manage and operate a waste burial site). Further, under established Commission practice, the Staff routinely conducts inspections to verify licensee compliance with its license, license conditions and commitments;²³ the fact that the Staff will conduct such inspections here does not give rise to a hearing right.²⁴

Further, the Board’s decision is not inconsistent with the Commission’s decision in *Consolidated Edison Co. of New York, Inc.* (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 952 (1974) -- where the Commission stated, “post-hearing resolution must not be employed to obviate the basic findings prerequisite to an operating license -- including

²³ *See generally*, 10 C.F.R. §§ 50.70, 72.82, 72.232. Failure by a licensee to abide by the terms of its license, license conditions, or Commission Order may result, *inter alia*, in revocation or suspension of the license or the imposition of civil penalties. *See, e.g.,* 10 C.F.R. §§ 72.44(b)(2), 72.60(a), 72.84.

²⁴ *Cf.* 5 U.S.C. § 554(a)(3) (excepting from the Administrative Procedure Act’s procedural requirements the need for adjudicatory proceedings where “decisions rest solely on inspections, tests, or elections.”)

a reasonable assurance that the facility can be operated [safely].” In that decision, the Commission also indicated that some items may be left for post-licensing resolution, as long as the Board is “able to make the findings requisite to issuance of the license.” *Indian Point*, CLI-74-23, 7 AEC at 951-52. In the instant case, the Board was able to make a finding of “reasonable assurance” based on the imposition of license conditions which restrict the applicant’s ability to construct and operate the facility unless it has obtained funding sufficient to pay the estimated (and litigated) construction and operating costs. Since these broad license conditions were sufficient to support a reasonable assurance finding, the *Indian Point* standard has been satisfied.²⁵

Nor does the Board’s decision contravene the fundamental principle that in any proceeding for which a hearing is required by Section 189(a) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a)(1), a person who requests a hearing must be given a meaningful opportunity to be heard on “all material factors bearing on the licensing decision raised by the requester.” *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1132 (1985). Here, the State has not been deprived of a hearing on the issues it raised; rather, the Board admitted those concerns for litigation, and subsequently found, on summary disposition, that those concerns had been

²⁵ The State also cites *Public Service of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 318 (1978) (Utah Br. at 17). There, the Licensing and Appeal Boards (as well as the Staff) opposed delegation to the Staff of (a) a determination that the applicant had obtained a loan guarantee in the amount and form submitted to the Board, and (b) a finalized ownership participation agreement, where the Licensing Board expressed concern as to whether “major points of the agreements, including the allocation of ownership,” might change. The Appeal Board did not address the question of whether the approach utilized in the instant proceeding -- imposing binding license conditions on the applicant -- might have served as an alternative means of providing the assurance sought by the Board.

resolved. In sum, the State was given an opportunity to be heard on these matters, and no deprivation of its hearing rights has occurred.

The State contends that the matters left for post-licensing resolution by the Staff “relegat[es] financial qualification determinations to an inspection process in which the State has no role,” and that the determinations which the Staff will have to make “involve the exercise of agency judgment, not merely ministerial matters” (Utah Br. at 16). The State then lists a myriad of substantive judgments which it claims the Staff will be required to make without participation by the State, the Licensing Board or the Commission (*Id.*, at 18-21).²⁶ These concerns, however, have been properly addressed. For example, the State’s concern in Basis 5 as to how PFS will allocate liability and responsibility for fuel in its Service Agreements (Utah Br. at 18-19), was resolved based upon the Board’s recognition of PFS’ commitment to require its customers to retain title to their spent fuel and to include an allocation of legal and financial responsibility in its customer service agreements. LBP-00-06 at 49, 72-73. While the State complains that this commitment does not indicate how such responsibility will be allocated, it provided no reason to believe that such information is required to support a finding of reasonable assurance as to the applicant’s financial qualifications. *See id.* at 50, *citing Claiborne*.

Similarly, the State’s concerns as to how much of PFS’ funding will be provided by income versus debt financing (Utah Br. at 19) is irrelevant in that the license conditions cited by the Board require that funding must be sufficient to cover the facility’s (litigated)

²⁶ While the State asserts that the Staff’s proposed license conditions, cited by the Board, “are too vague and ambiguous to provide reasonable assurance that financial qualifications will be met” (Utah Br. at 20), the State also recognizes that the Board accepted those conditions based on the Commission’s adoption of similar license conditions in *Claiborne*. *See, e.g.*, LBP-00-06, slip op. at 24, 26.

construction and operating costs, including the cost of debt financing. See LBP-00-06, slip op. at 40, 43-44, 46, 54 (Bases 2, 3, 4, and 8). The State's concern over the Staff's assumption as to "the length of time PFS will be storing spent nuclear fuel" (Utah Br. at 19) is similarly moot, given the explicit limits on the license term and the requirement in license condition LC17-2 that long-term service agreements must be in place sufficient to cover operating, maintenance and decommissioning costs "for the entire term of the service agreements." With respect to the costs associated with a customer's default or demise (Utah Br. at 19-20), the Licensing Board correctly disposed of this matter based on the Applicant's commitments to include such provisions in its customer service agreements, and the Staff's role in verifying those agreements and PFS' reactor customers' fuel management and funding programs under 10 C.F.R. § 50.54(bb). See LBP-00-06, slip op. at 57, 73. The State's concern as to the accuracy of PFS' cost escalators (Utah Br. at 20) is similarly unavailing, since cost issues remain subject to litigation under Subpart 6 of the contention.

In sum, the Licensing Board's grant of partial summary disposition did not deprive the State of its hearing rights concerning the adequacy of PFS' financial qualifications to construct and operate an ISFSI under 10 C.F.R. Part 72.

3. The Licensing Board Did Not Overlook
Significant Issues of Material Fact.

In its Brief, the State contends that the Licensing Board overlooked significant material issues of fact which the State raised in opposition to the Applicant's motion for summary disposition. First, the State claims that the Board ignored material issues of fact concerning basis 2 (documentation of a sufficient financial base and the potential for

termination), basis 3 (documentation relating to financial strength), basis 4 (statement of assets, liabilities, and capital structure), basis 7 (documentation of a storage market and a showing that storage commitments will fund the facility), and basis 8 (documentation that debt financing is viable), as “no longer material to a reasonable assurance finding” based on the Applicant’s commitments and the license conditions (Utah Br. at 21, 22). The Licensing Board decided this issue correctly. In light of the Applicant’s commitments to have sufficient funding in place prior to the commencement of construction and/or operation, there was no longer any reason to evaluate the Applicant’s market potential or current financial strength, or the availability of debt financing. *See PFS*, CLI-98-13, 48 NRC at 36; *Claiborne*, 46 NRC at 307-08.

The State similarly asserts that the Board erred in concluding that the makeup of PFS members was immaterial (Utah Br. at 22). This determination was correct. As the Board found, information concerning the actual membership makeup of PFS and its members’ financial strength was no longer material to a financial assurance finding, since construction and operation may not proceed under the proposed license conditions cited by the Board unless adequate funding is in place to cover the cost of construction. *See LBP-00-06*, slip op. at 36-37.

The State also asserts that various issues remained unresolved concerning legal and financial responsibility in the event of early voluntary termination (basis 2), the need for sufficient financial documentation (basis 3), the allocation of legal and financial responsibility between PFS and its customers (basis 5), adequacy of offsite liability insurance (bases 5 and 10), and responsibility in the event of customer non-payment (basis 9) (Utah Br. at 23). While the State appears to claim that the Board ignored “material facts”

concerning these issues (*Id.*), in fact, the State had presented, not facts, but arguments and the assertion that since PFS had not yet submitted its form of customer service agreements, a number of essentially legal questions remained to be resolved (see Utah Br. at 23).²⁷ The Board's reliance on the Applicant's commitments and license conditions appropriately resolved these matters. Further, there was no need for the Board to evaluate the terms and conditions of the service agreements and other financial documents, since the license conditions and the Applicant's commitment to include provisions addressing these matters in its documents sufficed to assure that the documents would address those matters.²⁸

Finally, the State contends that the Board erred in treating financial documents, including service agreements, as "mere 'implementing details,'" since they are "the means with which the Applicant proposes to provide reasonable assurance of funding the facility" (Utah Br. at 24). According to the State, "merely requiring the Applicant to enact a generalized commitment is basically meaningless without evaluating how the commitment will be carried out and whether it is adequate," and leaving this task to an NRC inspector "inappropriately abdicates the reasonable assurance determination to the discretion of an

²⁷ See *generally*, "State of Utah's Response to the Applicant's Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes Contention F," dated December 27, 1999, "State of Utah's Statement of Disputed and Relevant Material Fact."

²⁸ The State cites the Staff's Statement of Position concerning this contention, in which the Staff found that given the lack of customer service agreements and member subscription agreements, "the documents supplied to date are insufficient to support reasonable assurance that PFS is financially qualified to construct, operate, and decommission the proposed facility pursuant to 10 C.F.R. § 72.22(e)." Utah Br. at 23, *citing* "NRC Staff Statement of Its Position Concerning Group I-II Contentions, dated December 15, 1999, at 4. This Staff finding must be read in conjunction with the Staff's further finding (cited by the State), that the license conditions resolve these matters. *Id.*

inspector.” *Id.* However, 10 C.F.R. § 72.22(e) does not explicitly require an applicant to provide such documents to show financial assurance, nor are such agreements required by the Commission’s *Claiborne* decision. In view of the Applicant’s commitments and license conditions, the Licensing Board correctly held that such matters, similar to emergency plan “implementing details,” may be left for post-licensing verification. LBP-00-06, slip op. at 40-41, *citing Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1106-07 (1983).

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that the Licensing Board properly granted the Applicant’s motion for partial summary disposition, and that the Commission should undertake review of and affirm the Board’s decision.

Respectfully submitted,

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 17th day of April, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO 'STATE OF UTAH'S BRIEF TO THE COMMISSION REGARDING THE LICENSING BOARD'S GRANT OF SUMMARY DISPOSITION OF BASES UNDER UTAH CONTENTION E/CONFEDERATED TRIBES CONTENTION F'" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the Nuclear Regulatory Commission's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the United States mail, first class, as indicated by double asterisk, with copies by electronic mail as indicated, this 17th day of April, 2000.

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