

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S MOTION IN LIMINE
TO EXCLUDE PORTIONS OF PREFILED TESTIMONY OF
MICHAEL F. SHEEHAN, Ph.D. REGARDING UTAH CONTENTION S

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.730 and 2.743 (c), and the Atomic Safety and Licensing Board's "Memorandum and Order (Granting Joint Motion to Approve Stipulation on Contention Utah S and Outlining Administrative Matters)" (Order), dated May 1, 2000, the staff of the Nuclear Regulatory Commission (Staff) hereby requests that the Licensing Board issue an Order, *in limine*, excluding portions of the prefiled testimony of Michael F. Sheehan, Ph.D., relating to Utah Contention S from the record of this proceeding. For the reasons set forth below, the Staff submits that issues relating to the vintage of the data underlying the Applicant's decommissioning cost estimates are outside of the scope of Utah Contention S.

BACKGROUND

The State of Utah's original Contention S, ("Decommissioning"), as admitted by the Licensing Board, raised issues pertaining to the sufficiency of the Applicant's decommissioning plan to provide reasonable assurance that the decontamination or decommissioning of the ISFSI at the end of its useful life will provide adequate protection to the health and safety of the public as required by 10 C.F.R. § 72.30(a) and to provide

reasonable assurance that the necessary funds will be available to decommission the facility, as required by 10 C.F.R. § 72.22(e). *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 196-97 (1998).¹ Thereafter, the Licensing Board dismissed all portions of Utah Contention S that relate to the Rowley Junction Intermodal Transfer Point. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-39, 50 NRC 232,233,236 (1999).

The scope of contention Utah S was further limited by agreement of the Applicant and State, and the stipulated language regarding the matters to be litigated under contention Utah S was approved by the Licensing Board.² *See Order at 3; "Joint Motion By the State of Utah and the Applicant to Approve Stipulation For the Hearing of Utah Contention S," dated April 7, 2000.* Of relevance to the instant motion are revised bases 4 and 10, which state:

Basis 4: The Applicant has failed to justify the basis for its decommissioning cost estimates of \$17,000 to decommission a storage cask and of \$1,631,000 to decommission the remainder of the ISFSI in that (i) the decommissioning cost estimates do not state the year's dollars used (e.g., 1997 dollars) as provided in NUREG-1567, Draft Standard Review Plan for Spent Fuel Dry Storage Facilities, LA Appendix B, Chapter 4, and (ii) the estimates are not properly escalated to convert past dollars values into future dollars values (i.e. the future value of costs when the costs are expected to be incurred).

¹ The admitted six bases for Utah Contention S alleged that: 1) the Applicant offers no reasonable assurance that it will be qualified to obtain a letter of credit; 2) the Applicant does not provide the wording of the letter of credit or state that it is irrevocable; 3) the Applicant has not justified the basis for all decommissioning cost estimates; 4) the Applicant ignores the potential for large accidents and associated release or contamination; 5) the Applicant does not describe the type of survey or sampling protocol; and 6) the Applicant has failed to provide decommissioning procedures and costs at an intermodal transfer facility.

² The Applicant, however, did not agree to the scope of the contention as it relates to the redrafted Basis 1. *Order at 2-3.* The Board established a briefing schedule to resolve this dispute. *Id.*

An applicant for a part 72 ISFSI license must submit a Decommissioning Funding Plan “at the time of the license application.” Regulatory Guide 3.66, Standard Format and Content of Financial Assurance Mechanisms required for decommissioning under 10 CFR Parts 30, 40, 70, 72 (hereafter “Reg. Guide 3.66”), at 1-3, 1-6. The Decommissioning Plan “must compare the cost estimate with present funds, and if there is a deficit in present funding the plan must indicate the means for providing sufficient funds for completion of decommissioning.” NUREG 1567, at 16-4. This information is missing from the application.

Furthermore, to ensure that sufficient decommissioning funds are available, the Applicant should take a conservative approach in estimating the maximum quantity of spent fuel casks to be stored at the site during the license term.

Basis 10: The Applicant specifies that decommissioning costs include \$250,000 for a survey of the ISFSI site. LA, App B, p. 4-6. The Applicant does not state the year’s dollars used (e.g., 1997 dollars) as provided in NUREG-1567, Draft Standard Review Plan for Spent Fuel Dry Storage Facilities, LA Appendix B, Chapter 4, and (ii) is not properly escalated to covert past dollars values into future dollars values (i.e. the future value of costs when the costs are expected to be incurred).³

On May 15, 2000, the State filed “Prefiled Testimony of Michael F. Sheehan, Ph.D. on Behalf of the State of Utah Regarding Contention Utah S.”

³ Bases 1 and 5 stated the following:

Basis 1: The Applicant has failed to provide reasonable assurance, as required by 10 CFR § 72.30(b), that funds will be available to decommission the ISFSI in that the letter of credit PFS intends to obtain “in the amount of \$1,631,000 to cover the estimated facility and site decommissioning costs, exclusive of the storage casks,” LA, App. B, p. 5-2, does not include funds for the decommissioning of the storage casks.

Basis 5: The decommissioning cost estimate totally ignores the potential for large accidents and associated release or contamination at the ISFSI. LA Appendix B, Chapter 4. The very large number of casks that are to be handled at the ISFI and the large number of operations and movements that will be required argue strongly for anticipating this potential and making arrangements for a multimillion dollar increase in decommissioning to “provide reasonable assurance that the planned decommissioning of the ISFSI will be carried out” as required by 10 C.F.R. § 72.30.

DISCUSSION

The rules governing the admissibility of evidence in an NRC adjudicatory proceeding are set forth in 10 C.F.R. § 2.743(c), which specifies that “[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted.” Information appearing in prefiled testimony that is outside the scope of an admitted contention is not material and relevant to any issue in the proceeding, and is, therefore, inadmissible. If an intervenor wishes to have testimony on a late-filed contention or basis admitted for litigation, the intervenor must satisfy the balancing test for late-filed contentions. See 10 C.F.R. § 2.714(a)(1). Therefore, testimony concerning issues that are not within the admitted contention and admitted bases is irrelevant and immaterial and should be stricken.

In the pre-filed testimony of Dr. Sheehan with respect to Utah Contention S, the State seeks to raise as an issue the vintage of the data used underlying the Applicant's cost estimates. The vintage of the data underlying the cost estimate is outside of the scope of Utah Contention S.

Specifically, Question 19 asks, “Has PFS identified the vintage of the data used for its decommissioning cost estimates?”. In response, Dr. Sheehan states, “Not in any document that has been made available to me.” Then, Question 20 asks, “Is it possible to determine the validity of the decommissioning cost estimate without knowing the vintage of the data underlying the estimate and the years dollars?” Dr. Sheehan responds, “No. If you didn’t know and you assumed that a cost estimate was based on current cost data in current dollars, then you would have underestimated the cost of decommissioning by the amount of the real cost increase and the rate of inflation between the actual year of the data and the actual years dollars to the current year.” These questions and answers raise

an issue that it outside of the scope of Utah Contention S, as approved by the Licensing Board, and should be stricken.

The Licensing Board approved the parties' stipulation that the scope of Bases 1 and 4 included the issue of whether the Applicant failed to justify the basis for decommissioning cost estimates in that the decommissioning cost estimates do not state the year's dollars as provided in NUREG-1567. *Order* at 2-3. The State's testimony, however, challenges that even if the year dollars of the cost estimates were provided, it is not possible to determine the validity of the decommissioning cost estimates without knowing the vintage of the data underlying the estimate. This raises a new matter -- the vintage of the underlying data of the cost estimates, and is beyond the scope of the contention as stipulated by the Applicant and State, and approved by the Licensing Board.

CONCLUSION

For the reasons set forth above, the Staff submits that the Staff's Motion in Limine should be granted.

Respectfully submitted,

Catherine L. Marco */RA/*
Counsel for NRC Staff

Dated at Rockville, Maryland
this 31st day of May 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION IN LIMINE TO EXCLUDE PORTIONS OF PREFILED TESTIMONY OF GARY A. WISE," "NRC STAFF'S MOTION IN LIMINE TO EXCLUDE PORTIONS OF PREFILED TESTIMONY OF MICHAEL F. SHEEHAN, Ph.D. REGARDING UTAH CONTENTION S," and "NRC STAFF'S MOTION IN LIMINE TO EXCLUDE CERTAIN EXHIBITS FILED BY THE STATE OF UTAH" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterick, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 31st day of May, 2000:

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