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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, L.L.C.	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel Storage Installation)	February 4, 2000

MEMORANDUM AND ORDER
(Denying Motion to Strike Pleading)

In its January 10, 2000 reply to the NRC staff's December 22, 1999 response to a December 3, 1999 motion of applicant Private Fuel Storage, L.L.C., (PFS) for partial summary disposition of contention Utah E/Confederated Tribes F, Financial Assurance, intervenor State of Utah (State) outlined what it believed were differences between the proposed financial qualifications license conditions in chapter 17 of the staff's December 15, 1999 Safety Evaluation Report (SER) for the proposed PFS facility and those discussed in the staff's December 22, 1999 response. By motion dated January 19, 2000, the staff now asks the Board to strike those portions of the State's reply that rely upon an erroneously released "draft" version of the

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financial qualifications portion of the SER, a position opposed by the State but supported by PFS.

For the reasons set forth below, we deny the motion.

I. BACKGROUND

According to the staff representations in its motion to strike, the State received the first rendition of the December 15, 1999 SER on December 27, 1999. One day later, however, the staff discovered that the issued version of the SER contained an incorrect, draft version of chapter 17. As a result, the SER was replaced on January 7, 2000, by a version that included proposed license conditions with language consistent with the discussion in the staff's December 22, 1999 response. As the basis for its motion, the staff indicates that by a January 7, 2000 letter to the service list for the PFS application, which includes the State, the staff forwarded the revised SER and requested that the prior, incorrect version be destroyed or returned. Thereafter, on January 18, 2000, staff counsel requested that the State amend its January 10, 2000 pleading in light of the references to the incorrect material, which the State declined to do. See NRC Staff's Motion to Strike Portions of "[State] Reply to the Staff's Response to the [PFS] Motion for Partial Summary Disposition of Utah

Contention E/Confederated Tribes Contention F" (Jan. 19, 2000) at 2-4 & n.8.

The staff maintains that the State's refusal to delete these references to the incorrect material warrants striking those references. Applicant PFS agrees, declaring, among other things, that staff draft documents have no legal status in agency licensing proceedings. See [PFS] Support of NRC Staff Motion to Strike Portions of [State] Reply to Staff Response to [PFS] Motion for Summary Disposition of Contention Utah E (Jan. 28, 2000) at 2 & n.2.

In its January 28, 2000 response to the staff's motion to strike, while noting that the staff has not cited any authority supporting its requested relief, the State declares that even if the Board has the authority to strike its pleading the staff's motion is an improper attempt to rewrite the record that existed at the time the State filed its January 10, 2000 reply. Further, the State declares that the relief requested is an inappropriate remedy for the staff's own errors in issuing an incorrect version of the SER and in failing to give the State timely notice of the error or of the SER's reissuance. According to the State, although the staff apparently revised and reprinted the SER on January 4, 2000, and issued it on January 7, 2000, it sent the replacement to the State by third-class mail. As a result, the revised SER did not arrive until

January 24, 2000, although the State, by reason of a January 12, 2000 telephone conversation with staff counsel, received a copy on January 18, 2000.

All this, the State declares, not only warrants denial of the motion, but further strengthens its case that the staff's supporting affiant, Mr. Alex F. McKeigney, has not done a careful review of financial assurance for the PFS facility. In any event, the State concludes, even if the Board finds State references to the original SER are inappropriate, the State should be provided an opportunity to amend its reply. See [State] Response to NRC Staff's Motion to Strike Portions of "[State] Reply to the Staff's Response to the [PFS] Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes Contention F" (Jan. 28, 2000) at 3-7, exh. 3.

II. ANALYSIS

In the context of a telephone discussion on scheduling held the day before the State and PFS responses to the staff's motion were submitted, the Board found reason to praise the parties to this proceeding for their cooperative efforts, which the Board noted was one of the "hallmarks" of this case. See Tr. at 1273. Unfortunately, the particular controversy before the Board does not appear to be an

additional example of that spirit of reasonable accommodation.

Given the clear relevance of SER chapter 17 to the pending PFS summary disposition motion and the State's scheduled reply filing regarding that motion, the staff's December 28, 1999 discovery of the problems with that chapter, however disconcerting, should have engendered a reasonably prompt attempt to advise the State of the problem and reach an accommodation regarding that pleading.[1] Instead, the staff apparently gave no special attention to the matter relative to the State, as evidenced by its transmittal of the revised SER by third-class mail at the same time it was sent to everyone else on the service list.[2] As a result, and not wholly unexpectedly, the State filed a reply pleading that identified and analyzed, in the context of the PFS motion, the relevance of the apparent disconnect between the staff's position as stated in its December 22,

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[1] For example, a phone call or e-mail exchange between counsel might have resulted in a two-page joint motion for a reasonable extension of the filing date for the State's reply pleading to allow it to assess the revised SER, thus avoiding the more than fifty pages of pleadings and attachments that are now before the Board.

[2] From the Board's own experience with the agency's mailing system it is aware that, absent special instructions, large packages (such as a several hundred page SER) will be sent out from the agency's mail room as third-class mail.

1999 response and the SER version that the State was provided by the staff.

This being said, it also is apparent that once this problem was brought to the State's attention, the State has sought to assign it a significance that is out of proportion to its true import. Clearly, someone on the staff made an unfortunate (and somewhat embarrassing) administrative error. Nonetheless, the State's attempt to turn this mistake into an indictment of the staff financial assessment review process, and of Mr. McKeigney in particular, seems unwarranted. The arguments made in the staff's response in support of the applicant's motion are wholly consistent with the language in the SER, as revised. As a consequence, we have no cause to believe the problem with chapter 17 was other than as was represented by the staff: an administrative error that involved the misplacement of a draft chapter in the SER. Moreover, even assuming Mr. McKeigney bears responsibility for not catching the insertion of this draft section in the SER (which is not apparent from what is before us now), we are unable to see the significance of this administrative mistake relative to his ability to reach a substantive determination on the applicant's compliance with the financial qualifications provisions of 10 C.F.R. Part 72.

Under these circumstance, assuming arguendo that we have the power to strike the State's reply as requested by the staff, we decline to do so. As the State points out, its pleading reflects the state of the record as it stood, from the State's perspective, when the reply was filed. We thus deny the staff's motion to strike.

In taking this action, however, we note that the crux of the Board's concern is that it understand the State's position on the PFS motion relative to the staff's response, which clearly was based on the SER, as revised. We think we do. The State assumed the position stated by the staff in its response (as opposed to what was said in the original SER regarding the proposed license conditions) was what the State needed to address in its reply. See [State] Reply to the Staff's Response to [PFS] Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes F

(Jan. 10, 2000) at 2. We will conduct our review of the motion in that light.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD[3]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

This memorandum and order is issued pursuant to the authority of the Chairman of the Atomic Safety and Licensing Board designated for this proceeding.

Rockville, Maryland

February 4, 2000

[3] Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PFS; (2) intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the staff.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O DENYING MOT. TO STRIKE have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
4 day of February 2000

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