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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD '00 FEB -3 P 4 :24

In the Matter of:)		
)	Docket No. 72-22-ISFSI	ADJ
)		
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI	
(Independent Spent Fuel)		
Storage Installation))	January 26, 2000	

**STATE OF UTAH'S REQUEST FOR ADMISSION OF
LATE-FILED BASES FOR UTAH CONTENTION E**

Introduction

Pursuant to 10 CFR § 2.714, the State of Utah hereby seeks the admission of late-filed new Bases 11, 12, and 13 for Utah Contention E, which challenges the adequacy of the Applicant's financial assurance plan. This Request is being made as a result of NRC Staff's issuance of the Safety Evaluation Report ("SER"). As discussed below, this Request for Admission of Late-filed Bases for Utah Contention E satisfies the Commission's criteria for admission of late-filed contentions. This Request is supported by the Declaration of Dr. Michael F. Sheehan, attached hereto as Exhibit 1.

Procedural Background

The State's original Contention E, as admitted by the Licensing Board in Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 187, 251-252, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998), states:

Contrary to the requirements of 10 CFR §§ 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....

Because of the similarity of Utah Contention E and Confederated Tribes of the Goshute Reservation Contention F, the Board consolidated the Contentions. LBP-98-7 at 144.

The Board set out the consolidated financial assurance contention Bases 1 through 10 in LPB-98-7, Appendix A, at 251-252.

The Staff issued its Safety Evaluation Report which proposed two license conditions¹ with respect to the Applicant's financial qualifications. SER at 17-7. The Staff bases its evaluation of the Applicant's financial assurance and decommissioning funding assurance on these two license conditions. The proposed license conditions state:

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 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

¹ The SER dated December 15, 1999 was originally received by the State on December 27, 1999. The original SER had two proposed license conditions different from those described in the Staff's Response to the Applicant's Partial Motion for Summary Disposition of Utah Contention E, filed on December 22, 1999. The Staff recalled and replaced the original SER to reconcile the different license conditions. Although the cover memo from Mark Delligatti, forwarding the SER which replaces Chapter 17 (Financial Qualifications and Decommissioning Funding Assurance) in the original SER, is dated January 7, 2000, the State received the revised SER with the Chapter 17 replacement on January 18, 2000.

References made in this document to the SER are, unless otherwise stated, references to the reissued document dated January 7, 2000.

sufficient to cover the operating, maintenance, and decommissioning costs of the Facility, for the entire term of the Service Agreements.

SER at 17-7.

Applicant's Partial Motion for Summary Disposition of Utah Contention E and Confederated Tribes Contention F ("Summary Disposition Motion") was filed on December 3, 1999. The Applicant's Summary Disposition Motion moved for disposition of Utah Contention E, Bases 1 through 5, and 7 through 10. The motion was based on two funding commitments made by the Applicant. Summary Disposition Motion at 3. The Staff filed its Response to Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F ("Staff Response") on December 22, 1999. Subsequently, the State filed its Response to Applicant's Partial Motion for Summary Disposition of Utah Contention E and Confederated Tribes F ("State's Response") on December 27, 1999. In addition, the State replied to the Staff's Response to the Applicant's Partial Motion for Summary Disposition of Utah Contention E and Confederated Tribes Contention F ("State's Reply") on January 10, 2000.

Briefing is complete on the Applicant's Motion for Summary Disposition except responses to the Staff's Motion to Strike, which are due January 28, 2000.

Requested New Bases

The State of Utah requests to supplement its bases in support of Contention E, as follows:

Basis 11: The Staff's proposed license conditions LC17-1 and LC17-2 (SER at 17-7) contravene the financial qualification requirements of 10 CFR §§ 72.22(e) and 72.40(a)(6), which require a substantive determination of financial qualification before a license is issued. The proposed license conditions do not assure that the Applicant will be financially qualified at the time the license is issued because the Applicant neither possesses the necessary funds, nor has reasonable assurance of obtaining the necessary funds to cover estimated construction costs, estimated operating costs over the planned life of the ISFSI, and estimated decommissioning costs. Postponing the financial qualification analyses and determination to post-hearing resolution also violates Intervenor State of Utah's and other parties' rights to a prior hearing on all financial issues material to the licensing decision, and is contrary to Section 189(a)(1) of the Atomic Energy Act.

Basis 12: The Staff's proposed license conditions LC17-1 and LC17-2 (SER at 17-7) improperly grant to PFS an exemption to 10 CFR §§ 72.22(e) and 72.40(a)(6), without a request by the Applicant and without meeting the standards for exemption under 10 CFR § 72.7 or the standards for rule waiver under 10 CFR 2.758.

Basis 13: The Staff's proposed license conditions LC17-1 and LC17-2 (SER at 17-7) do not provide adequate standards or procedures against which Applicant's performance, and therefore its ability to meet the financial qualification

requirements of 10 CFR §§ 72.22(e) and 72.40(a)(6), can be judged. The licensing conditions are vague and open-ended, and do not establish procedures for making or challenging these future determinations. As a consequence, the licensing conditions completely deprive the State and other parties of a full and fair hearing on the issue of whether the Applicant is financially qualified to operate an ISFSI in Utah.

Basis for Request

In the SER the Staff proposed license conditions that do not allow the Applicant to commence construction and operation of the ISFSI pending the availability of funds to finance an initial capacity facility. SER at 17-7. The license conditions are based on funding commitments made by the Applicant. When it drafted Contention E and its bases, the State did not and could not have contemplated that the Applicant would propose, or that NRC staff would accept, that 10 CFR §§ 72.22(e) and 72.40(a)(6) could be satisfied with simplistic license conditions or vague funding commitments. Given this recent change of position by the Applicant and Staff, the State must now request admission of additional bases for Contention E.

In its two pleadings responding to the Applicant's Summary Disposition Motion, the State has addressed many of the same issues that are pertinent to the admission of this Request. The information and arguments contained in the State's Response to the Applicant and Reply to the Staff are incorporated by reference into this Request and, below, are summarized and cross referenced to the relevant pleadings.

The Staff has violated NRC regulations by accepting the SER license conditions as demonstrating reasonable assurance of financial qualifications. *See* State's Reply at 3-7. The Staff's proposed license conditions and the Applicant's funding commitments are premised on Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997) (hereinafter "LES") and the Commission's comment in this proceeding when it issued an order addressing standing appeals.² SER at 17-2, -3; Staff Response at 9-11; Summary Disposition Motion at 3-4. However, as discussed in the State's Response, the decision in LES is not applicable in this case because it was decided under different regulations, Part 70, not Part 72. *See* State's Response at 4-6. Additionally the facility in LES, and more importantly, the health and safety factors, are substantially different than those proposed for the PFS facility. *See* State's Response at 7-8.

The Applicant has not applied for an exemption or waiver from Part 72. The effect of the proposed license conditions is that the Staff has improperly granted to the Applicant an exemption to these requirements without a request by the Applicant and without meeting the standards for exemption under 10 CFR § 72.7 or the standards for rule waiver under 10 CFR 2.758.

The license conditions do not satisfy the financial assurance requirements of 10 §§ CFR 72.22(e) and 72.40(a)(6). The Applicant relies on financing its project on a pay-

² Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36-37 (1998) (hereinafter "CLI-98-13").

as-you go basis. *See e.g.*, LA at 1-5 (Rev. 1). Such an approach to a limited liability company without any independent assets does not assure that the Applicant will be able to adequately fund the estimated cost of construction, operations over the life of the facility or decommissioning cost. Sheehan Dec. ¶8. Moreover, reliance on the license conditions or funding commitments to satisfy financial assurance regulations precludes an up front determination of financial qualifications as required by Part 72. *See* State's Response at 9-11; *see also*, State's Reply at 4-6.

In addition, the license conditions are vague, ambiguous, and unenforceable. *See* State's Response at 14 and State's Reply at 7-10. There are no standards by which satisfaction of the license conditions can be judged, nor is there any indication of when a determination will be made or by whom. *See* Sheehan Dec. ¶ 8; State's Response at 14-16; and State's Reply at 7-12. Finally, post-license review of PFS's demonstration of financial assurance violates Intervenors' and other parties' rights to a hearing. *See* State's Response at 15-18; *see also*, State's Reply at 11.

Satisfaction of Late Filed Factors

The State meets the 10 CFR § 2.714(a) late filed factors for amending the bases for its Contention Utah E.

Good Cause

The Board has indicated that late-filed contentions based on the SER should be submitted no later than thirty days after the SER is made available to the public.

Memorandum and Order (General Schedule for Proceeding and Associated Guidance), at

5 (June 29, 1998). In its order, the Board requested that the Staff notify the intervenors of “its intent to make the [SER] publicly available no later than fifteen days before the [SER is] issued publicly.” Id. When the Staff filed the Statement of Its Position Concerning Group I-II Contentions on December 15, 1999, the Staff mentioned that the SER was being issued on the same date. On or about December 15, 1999, the State requested a copy of the SER from the Staff and was told that the SER had been sent to the printers and that the State, along with others on the service list, would be served with a copy after the SER was printed.³ Thus, the State did not receive 15 days' advance notice that the Staff was about the issue the SER. The State only learned of the Staff's proposed license conditions when it received a copy of the SER. Although the SER is dated December 15, 1999, the State did not receive a copy of the SER until December 27, 1999.

The license conditions in the December 15 version of the SER are not the license conditions the Staff currently relies upon. Through memorandum dated January 7, 2000, the Staff advised that it had made an error in the December 15 version of the SER and provided a replacement copy of the SER with a new version of the chapter that is pertinent to this Request, Chapter 17 - Financial Qualification and Decommissioning Funding Assurance. The new version contained different licensing conditions. The State did not receive the replacement Chapter 17 with the current license conditions until January 18, 2000.

³ Telephone conversation between counsel for the Staff and counsel for the State.

For these reasons, the State's Request for Admission of Late-filed Bases for Utah Contention E is timely because it is filed within thirty days of the receipt of the SER.

Development of a Sound Record

The State's participation, and the testimony of its expert Dr. Michael F. Sheehan in this matter, will assist in developing a sound record with respect to the two license conditions proposed in the SER. For the past 20 years Dr. Sheehan has focused on the economics and finance of project planning and regulation. *See* Sheehan Dec. ¶ 3. Dr. Sheehan participated, reviewed and supported the State's Response and Reply to the Applicant's Motion for Summary Disposition of Utah Contention E. As can be seen in those documents, Dr. Sheehan's testimony would include the specifics of why the proposed license conditions do not provide reasonable assurance that the Applicant will be capable of providing necessary funds to construction, operation and decommissioning the PFS facility. *See e.g.*, State's Response, Exhibit 1, ¶¶ 6-23, and State's Reply, Exhibit 1 at ¶ 6; *see also* Sheehan Dec. ¶ 10. Dr. Sheehan's testimony and participation will give the Board a different and important perspective on the Applicant's financial qualifications.

Availability of Other Means for Protecting The State's Interests

To the extent that the Staff's license conditions remain intact after the Board issues its decision on the pending Summary Disposition Motion, the State must file these new bases to Contention E to protect its interests. In addition, the State has no alternative means, other than this proceeding, for protecting its interest in assuring that the Applicant

obtains adequate financial assurance.

Representation by Another Party

The State's position will not be represented by any other party, as there is no other party with a similar contention admitted to this proceeding.

Broadening of Issues or Delay of the Proceeding

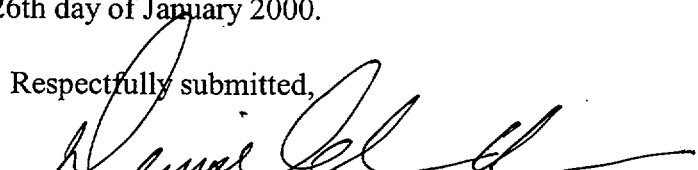
The admission of these additional bases will focus the proceedings on the Staff's action and will not broaden the proceeding beyond the scope initially envisioned in LBP-98-7. The admission of these additional bases will not cause any overall delay in the proceeding.

Conclusion

For the foregoing reasons, the State's additional bases for Contentions E are admissible and meet the Commission's standard for late filed contentions. Accordingly, they should be admitted.

DATED this 26th day of January 2000.

Respectfully submitted,



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CERTIFICATE OF SERVICE

DOCKETED
USDC

I hereby certify that a copy of STATE OF UTAH'S REQUEST FOR
ADMISSION OF LATE-FILED BASES FOR UTAH CONTENTION E was served on
the persons listed below by electronic mail (unless otherwise noted) with conforming
copies by United States mail first class, this 26th day of January, 2000:

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