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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation)	)	ASLBP No. 97-732-02-ISFSI
	)	April 5, 2000

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

Template = SECY-021

SECY-02

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

NRC DECISIONS

FEDERAL REGULATIONS

FEDERAL STATUTES

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In accordance with the Nuclear Regulatory Commission's March 24, 2000 Order, the State of Utah hereby submits its brief addressing LBP-00-06, Memorandum and Order Granting in Part, Denying in Part, and Referring Ruling on Summary Disposition Regarding Contention Utah E/Confederated Tribes F (March 10, 2000).

The question before the Commission is what kind of a showing of regulatory compliance must be made in the record of this proceeding in order to demonstrate a reasonable assurance that Private Fuel Storage, LLC ("PFS" or "Applicant") can obtain all funds necessary to construct, operate and decommission the PFS facility safely. Aside from the question of what the facility will cost, the Licensing Board has dismissed all of the State's concerns about PFS's lack of financial qualifications, based solely on PFS's commitment to obtain sufficient funding after it is granted a license. The record is devoid of any evidence that PFS has or will obtain the funding necessary to construct and operate the PFS facility.

The Licensing Board claims that this result is countenanced by the Commission's decision in Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997). The State submits that this case is distinct from Claiborne in significant respects that are overlooked or misunderstood by the Licensing Board. Claiborne cannot be read to permit the wholesale deferral of resolution of material licensing issues to post-licensing enforcement of license conditions. By accepting prospective commitments and license conditions as adequate to resolve the contested issues raised by the State regarding PFS's failure to satisfy 10 CFR § 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.

I. BACKGROUND

A. Factual Background

PFS proposes to build the largest independent spent fuel storage installation ("ISFSI") in the United States on a very small Indian reservation located in western Utah, about 45 miles from Salt Lake City and the populous Wasatch Front. As proposed, this away-from-reactor ISFSI would store up to 40,000 metric tons of uranium ("MTU") of spent nuclear fuel rods in dry cask storage, over two orders of magnitude larger than any ISFSI presently existing in the United States. It is designed to accept spent nuclear fuel ("SNF") from a multitude of reactors throughout the United States. The Applicant is a newly formed Delaware-based limited liability company created by a consortium of nuclear power generators solely for the purpose of licensing and building a centralized

4,000 cask ISFSI. LA, Rev. 0, at 1-3.

B. Procedural History

Contention Utah E/Confederated Tribes F (hereinafter "Utah E"), financial assurance, submitted on November 23, 1997, was admitted by the Licensing Board and consolidated with similar contentions of two other intervenors, including Confederated Tribes, in LBP-98-07, 47 NRC 142, 187, 215, 236 (1998). The text of Contention E as set forth in LBP-98-07, App. A, is attached hereto as Exhibit 1.

In brief, Contention E charges that the Applicant, a limited liability company with no known assets, has provided virtually no evidence of basic information necessary for the Board or the Staff to evaluate its financial worthiness for licensing, including information about its assets, liabilities, capital structure, business plan, marketing plan, and sufficiency of assets to cover non-routine expenses, including the costs of a worst case accident in transportation, storage, or disposal of the SNF as required by 10 CFR §§ 72.22.(e)and 72.40(a)(6). Instead, PFS has relied upon two commitments, memorialized in these license conditions proposed by Staff:

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

Safety Evaluation Report (SER) for the PFS facility (January 4, 2000) at 17-7.

PFS has adamantly refused to respond to many of Utah's discovery requests regarding to the admitted bases for Contention E, such as PFS's financial condition and plans, insisting that the license commitments render the discovery requests irrelevant.[1]

PFS filed its Motion for Partial Summary Disposition on December 3, 1999. The Staff and the State filed their responses December 22 and December 27, 1999, respectively. The State filed its reply to the Staff's response on January 10, 2000. The Licensing Board ruled on PFS's summary disposition motion March 10, 2000, disposing of all but part of basis 5 and 10 (on-site liability) and all of basis 6 (construction and operation costs) of Contention E.

II. REVIEW BEFORE THE COMMISSION

A. Commission Review of the Board's Decision Is Warranted Because the Decision Will Have a Pervasive Effect on the Proceeding.

The State urges the Nuclear Regulatory Commission to review the Board's ruling because of the ruling's pervasive and unusual impact on the proceeding. See 10 CFR § 2.786(g)(2). As described below, the Board's ruling 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. If the Commission does not hear these issues at this time, 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.

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[1] *See, e.g.*, Applicant's Objections and Proprietary Responses to State's Second Requests for Discovery (Groups II & III) (June 28, 1999) at 5-6.

Even if the impact on the proceeding is not found to be pervasive, however, the State suggests that the Commission should use its discretionary authority to review the Licensing Board's ruling.[2] As recognized by the Board in its order referring the ruling to the Commission, boards have recently been "encouraged to certify novel legal or policy questions relating to admitted issues to the Commission as early as possible." *See* Board decision at 71, quoting the "Statement of Policy on Conduct of Adjudicatory Proceedings," CLI-98-12, 48 NRC 18, 23 (1998). The Board's decision applying Claiborne to a Part 72 license adjudication is one of first impression and, as described in this memorandum, one with far-reaching impacts. The Commission has already indicated its interest in this issue. CLI-98-12, 48 NRC at 36-37.

B. Standard of Review

Commission review of Board decisions on legal and policy matters is de novo.[3] In reviewing factual determinations, the Commission must give due deference to the Licensing Board as the primary fact-finder.[4]

In the context of this review of a summary disposition decision, the Commission must also take into account the heavy burden borne by the movant, PFS. Pursuant to 10 CFR § 2.740, a party is entitled to summary disposition if "there is no genuine issue as to

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[2] Safety Light Corporation (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85 (1992).

[3] Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-97-13, 46 N.R.C. 195, 206 (1997).

[4] Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-303, 2 NRC 858, 867 (1975).

any material fact" and the party "is entitled to a decision as a matter of law." Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993). The burden of proving entitlement to summary disposition is on the movant, requiring that "the Board must view the record in the light most favorable to the party opposing such a motion." Id. Furthermore, if there is any possibility that a litigable issue of fact exists or any doubt as to whether the parties should be permitted or required to proceed further, the motion must be denied.[5] Summary judgment may also be denied or continued if the opposing party demonstrates in its affidavits that it cannot present facts essential to justify its opposition.[6]

III. ARGUMENT

A. The Law Governing the ISFSI Licensing Process Requires a Careful Pre-Licensing Review of Applicant's Financial Ability to Meet Its Obligations.

As permitted by Section 182a of the Atomic Energy Act, 42 U.S.C. § 2232(a), NRC regulations contain "financial qualifications" requirements for three classes of facilities: production and utilization facilities (*i.e.*, nuclear power plants); uranium enrichment facilities; and ISFSIs. As the Commission recognized in the Claiborne decision, the "fundamental purpose of the financial qualifications provision of . . . section [182a of the AEA] is the protection of public health and safety and the common defense

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[5] General Electric Co. (GE Morris Operation Spent Fuel Storage Facility), LBP-82-14, 15 NRC 530, 532 (1982).

[6] 10 C.F.R. § 2.749(c); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577 (1986).

and security." 46 NRC at 303, citing 33 Fed. Reg. 9704 (July 4, 1968). These regulations were promulgated out of the concern that a financially strained licensee is under more pressure to take safety shortcuts than a financially healthy licensee. As the Commission noted in promulgating the financial qualifications regulations for nuclear power plants:

> . . . a licensee in financially straitened circumstances would be under more pressure to commit safety violations or take safety 'shortcuts' than one in good financial shape. Accordingly, the drafters of the rule sought to achieve some level of assurance, prior to licensing, that licensees would not be forced by financial circumstances to choose between shutting down or taking shortcuts while the license was in effect.

49 Fed. Reg. 35,747, 35,749 (September 12, 1984).

The NRC's financial qualification requirements for ISFSIs are found at 10 CFR § 72.22(e).[7] In sum, these regulations require an ISFSI license applicant to demonstrate prior to licensing that it either has, or has reasonable assurance of obtaining, all funds

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[7] These regulations provide in relevant part that an applicant for a license to construct and operate an ISFSI must provide:

> 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 state the place at which the activity is to be performed, the general plan for carrying out the activity, and the period of time for which the license is requested. 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.
>
> (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.

10 CFR § 72.22(e)(1)-(3).

necessary to cover estimated construction and operating costs.

Neither the regulatory history of Part 72 nor other portions of Part 72 contains any additional guidance on what constitutes a showing that a license applicant has a reasonable assurance of obtaining the necessary funds to construct and operate an ISFSI. Both the Licensing Board and the Commission have stated that the more detailed provisions of the financial qualifications regulations in 10 CFR Part 50 provide "guidance," with the proviso that the Part 50 regulations are not applicable "in toto" and "do not necessarily apply outside the reactor context."[8] CLI-98-12, 48 NRC 26, 36 (1998); LBP-00-06, slip op. at 25. The Commission has also stated that the financial qualification standards "do not require the board to undertake a full-blown inquiry into an applicant's likely business success." CLI-98-13, 48 NRC at 36.

In granting summary disposition to PFS, the Licensing Board did not apply any of the guidance in the Part 50 regulations. Instead, the Board ruled that the "reasonable assurance" standard in 10 CFR § 72.22(e) could be satisfied by "a license provision that requires the applicant to meet certain fiscal requirements, the fulfillment of which are subject to post-license staff review, as a condition to beginning facility construction and operation." LBP-00-06, slip op. at 25. In making this ruling, the Board relied heavily on

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[8] For instance, newly formed entities must show the legal and financial relationships they have or propose to have with stockholders or owners, their financial ability to meet any contractual obligation to the entity which they have incurred or proposed to incur, and any other information deemed necessary. 10 CFR § 50.33(f)(3). In addition, Appendix C to Part 50 requires identification of specific sources of funding, and if the sources of funds relied on include parent companies or other corporate affiliates, information to support the financial capability of each such source to meet its commitments to the applicant.

the Commission's interpretation of Part 70 financial qualifications regulations in the Claiborne case, as discussed in CLI-97-15, 46 NRC 294 (1997). The Part 70 regulations provide that a license will be issued for a special nuclear materials facility if the license applicant "appears to be financially qualified." 10 CFR § 70.23(a)(5). In Claiborne, the Commission determined that this regulation could be satisfied by commitments by the applicant to obtain sufficient funding after licensing. CLI-97-15, 46 NRC at 307-308.

In applying the Claiborne holding wholesale to PFS, the Licensing Board made significant legal and factual errors in the interpretation of 10 CFR § 72.22(e) and the determination of applicable guidance. First, the Board effectively equated the Part 70 and Part 72 regulations, despite significant differences in their plain language and regulatory history. Second, the Board erroneously concluded that the level of risk posed by the PFS facility was 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.

1. The Licensing Board Erred in Interpreting the Express Language and the Regulatory History of § 72.22(e).

The wording of the Part 72 and Part 70 standards is distinctly different. The Part 72 standard requires a license applicant to demonstrate "reasonable assurance of obtaining the necessary funds or that by a combination of the two, the applicant will have the necessary funds" to construct and operate the proposed ISFSI. This language is virtually identical to the reasonable assurance language in 10 CFR § 50.33(f)(1) and (2),

which requires an applicant to demonstrate that it "possesses or has reasonable assurance of obtaining" the funds necessary to cover construction and operation costs. In contrast, the Part 70 standard permits the issuance of a license if the applicant "appears to be financially qualified." In addressing the difference between the Part 70 standard and the Part 50 standard, the Commission itself recognized this difference, and found that the "reasonable assurance" language set a higher standard than the "appearance" standard.[9] As the Commission concluded, "[t]he fact that the Part 70 and Part 50 financial qualifications provisions are written so differently is significant." Id. at 300.

Moreover, the history of Part 72 demonstrates that the Commission intended to follow the model of the Part 50 regulations for evaluating financial qualifications, rather than the model for the Part 70 regulations. As the Licensing Board recognized in LBP-00-06, at the time that the Commission promulgated its first set of ISFSI regulations, ISFSIs were being regulated under Part 70. LBP-00-06, slip op. at 25 n. 3, citing 45 Fed. Reg. 74,693 (1980).[10] In considering the content of its set of brand-new ISFSI regulations, the Commission had the option of continuing to apply the Part 70 financial

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[9] As the Commission observed, the Part 50 regulations:

> contain no equivalent of Part 70's "appears to be financially qualified" language but instead require every applicant at the construction stage to submit financial information demonstrating that it actually "possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs."

CLI-97-15, 46 NRC at 299.

[10] As the Commission recognized in promulgating the ISFSI regulations, "[e]xperience with licensing actions under [Part 70] demonstrated the need for a more definitive regulation to cover spent fuel storage in an ISFSI." 45 Fed. Reg. 74,693 (1980).

qualifications regulation that it had been applying to ISFSIs up until that point. Indeed, it would have been logical to expect the Commission to continue to apply the Part 70 regulation. Significantly, however, the Commission did not adopt the Part 70 financial qualifications language for ISFSIs. Instead, it adopted language virtually identical to the reasonable assurance standard in 10 CFR § 50.33(f) by requiring a demonstration of reasonable assurance that the applicant has or will have sufficient funding to construct and operate the facility.

The adoption of this more stringent language strongly indicates the Commission's intention to ensure that ISFSI licensing followed the general model of nuclear power plant licensing with respect to financial qualifications determinations, *i.e.*, that there would be an on-the-record showing with respect to whether the license applicant can show reasonable assurance of obtaining the necessary funding for construction and operation.[11] *See e.g.*, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-77-67, 6 NRC 1106, 1116 (1977) (requiring demonstration of loan guarantees before licensing).

In ruling for PFS on summary disposition, the Licensing Board completely failed to address the implication of the facial difference in the language of the Part 70 and 72

[11] Admittedly, the Commission did not also incorporate the entire text of 10 CFR § 50.33 or Appendix C to Part 50 into the financial qualifications rule for ISFSIs when it adopted the reasonable assurance language of § 50.33(f). As the Commission has recognized, the additional provisions of § 50.33(f) and Appendix C do provide useful guidance for the licensing of ISFSIs. Moreover, as discussed in Section III.A.2. below, it is appropriate to apply this guidance to the PFS licensing case. In any event, it is important to recognize that even without the incorporation of all of § 50.33(f) and Appendix C into the Part 72 standard, § 72.22(e) is significantly stronger and stricter than the Part 70 standard.

standards, or the significance of the Commission's adoption of financial qualifications regulations whose language closely modeled the regulations for nuclear power plants. Instead, the Licensing Board simply applied the formula used by the Commission in Claiborne to address the "appears to be financially qualified" standard, *i.e.*, the acceptance of commitments by the licensee to obtain funding at some time in the future, and license conditions encoding those commitments. While reliance on such commitments and license conditions arguably may be appropriate for an interpretation of the Part 70 financial qualification regulations, it is not permitted by the Part 72 regulations, which require an on-the-record showing that the applicant either has the necessary funds or has "reasonable assurance of obtaining necessary funds."

The Board's acceptance of a subjective commitment by PFS, unsupported by any demonstration that it can or will be fulfilled, also deprives the term "reasonable assurance" of any meaning. The phrase "reasonable assurance" necessarily implies an objective assessment regarding the likelihood that a license applicant can obtain funding. Under the Board's ruling, however, the applicant need only state its hopeful intention to fulfill the regulation at some time in the future. The regulation cannot be read in such a way as to make the reasonable assurance language "inoperative"; all parts of the standard must be given meaning.[12] Colautti v. Franklin, 439 U.S. 379, 392 (1979).

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[12] The Board's nullification of the reasonable assurance language also has significant negative implications with respect to the interpretation of the phrase "reasonable assurance" with respect to the entire gamut of NRC safety regulations. Under 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. This would make a nullity of the entire NRC regulatory scheme.

2. The Licensing Board Erroneously Concluded that the Part 50 Guidance Is Inapplicable.

The Licensing Board also erred in concluding that the characteristics of the PFS facility do not warrant the application of Part 50 guidance in this case, and that a commitment by PFS to obtain sufficient funding will suffice to satisfy 10 CFR § 72.22(e). LBP-00-06, slip op. at 26-28. The Commission rejected arguments and evidence presented by the State demonstrating that the proposed PFS facility – a one-of-a-kind centralized spent fuel storage facility with an enormous inventory of highly radioactive waste, to be built and operated by a newly-formed entity – is fundamentally more hazardous than the uranium enrichment plant addressed in the Claiborne decision, and therefore, warrants a more stringent financial qualifications review. *See* State's Response at 6-7, Sheehan Declaration ¶¶ 13, 20 (December 27, 1999).

In concluding that ISFSIs are more like special nuclear materials facilities than nuclear reactors for purposes of assessing financial qualifications, the Licensing Board relied on Commission comments in a rulemaking that delegated the authority to approve the licensing of on-site ISFSIs to the Director of Nuclear Reactor Regulation. There, the Commission commented that ISFSIs generally pose lower risks than nuclear power plants, because they are not operated under conditions of high temperature and pressure, and because fuel radioactivity decreases over time in an ISFSI. LBP-00-06, slip op. at 26-28, citing 60 Fed. Reg. 20,879, 20,882-83 (1995).

The Board's reliance on the Commission's comments is misplaced. Notably, this

rulemaking did not involve the weakening of any substantive regulations, including the strenuous financial qualifications standard that the Commission had previously adopted. As discussed above, this standard is significantly stronger than the requirements for Part 70 facilities. Moreover, the rulemaking was limited to on-site ISFSIs, and the Commission specifically retained its role as the authorizing body for an MRS or an ISFSI "at other than a reactor site." 60 Fed. Reg. at 20,883. Although the Commission did not describe its reasons for this decision, the State has presented evidence that an away-from-reactor ISFSI like the PFS facility has peculiar characteristics that require a stricter standard for financial qualifications. In particular, it will be very difficult to return spent fuel to its originating reactors, and impossible to return it once they have been decommissioned.[13]

The Licensing Board also erred in ignoring the State's argument disputing the applicability to PFS of 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. LBP-00-06, slip op. at 29. As the State demonstrates in its Response, the PFS facility is distinctly different from the Claiborne facility with respect to the potential that large quantities of highly radioactive waste – up to 40,000 MTU – will be stranded at the PFS site, creating significant costs for PFS. As a practical matter, no amount of

[13] Once fuel is on-site, it cannot easily be returned to the reactor site. Furthermore, many of the reactors storing fuel at PFS will be decommissioned either prior to storing fuel at PFS or during the PFS license term. Therefore, the fuel will remain onsite at PFS regardless of whether the customer continues to make annual operating payments or whether PFS has sufficient funds to safely operate the facility. State's Response at 8.

enforcement will be able to deal with the large inventory of spent nuclear fuel casks that will have to remain at PFS if customers are unable or unwilling to take back their spent fuel. The Board simply found that the Commission took a "broader view" of the role of post-licensing resolution of safety issues. However, this purely legal finding does not address the State's factual arguments as to why reliance on enforcement of license conditions is not a useful tool in this proceeding.[14]

Another important issue ignored by the Board in rejecting the applicability of Part 50 guidance is the intractability of the problem of storage and disposal of high level nuclear waste, which has plagued the U.S. government for decades. One need only look at the U.S. Department of Energy and its default on its statutory obligation to pick up spent fuel by January 31, 1998, to understand the magnitude and difficulty of this problem. *See* State's Response at 9. Yet, the Licensing Board proposes to permit PFS to proceed with only the vaguest commitment to obtain funding. This is sheer folly. As the State points out in its Response, once the PFS facility is constructed, there will be an incredible impetus for PFS to go forward with operations to generate some revenue. PFS most likely will only be able to proceed with operations if the facility is laden with debt, raising the real concern that such a revenue stream will be insufficient to safely operate the facility. State's Response at 9. The Licensing Board clearly erred in ignoring this issue.

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[14] The Board's treatment of licensing issues as enforcement issues also violates the hearing requirements of the Atomic Energy Act. *See* Section B below.

B. Where an Applicant's Financial Qualifications Are Duly Contested, the Determination of Whether the Applicant Satisfies 10 CFR § 72.22(e) Must Be Made in the Context of an Adjudicatory Hearing.

1. The State Is Entitled to a Hearing on Material Licensing Issues with Respect to the Applicant's Financial Qualifications.

The State, following NRC's rigorous procedures, has gained admission of a contention challenging PFS's financial qualifications under Part 72. It has reviewed volumes of documents, conducted discovery and hired experts to assist in litigating Contention E. The Licensing Board's decision to accept license conditions wholly in the place of any substantial financial qualification demonstration on the record of this licensing proceeding renders meaningless the State's efforts by relegating financial qualification determinations to an inspection process in which the State has no role. As described below, important, substantive determinations that must be made in order to assess PFS's financial qualifications. These determinations involve the exercise of agency judgment, not merely ministerial matters.

The procedure accepted by the Board is in violation of the State's right to a prior hearing on all financial issues material to the licensing decision. In "any proceeding" for the granting of an operating license to a nuclear facility, "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a)(1)(A), Section 189(a)(1)(A) of the Atomic Energy Act. The hearing must offer an opportunity for "meaningful public participation." Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1446 (D.C. Cir. 1984), *cert. den.* 469 U.S.

1132 (1985), *quoting* Bellotti v. NRC, 735 F.2d 1380 (D.C. Cir. 1983) (*emphasis in original*). In order to be meaningful, the hearing must be complete in covering the full scope of material issues, and it must be reasonably timed. A meaningful opportunity to be heard means having the opportunity to be heard on "all material factors bearing on the licensing decision raised by the [hearing] requestor." Id., at 1443.

It is well-established that "the mechanism of post-hearing resolution must not be employed to obviate the basic findings requisite to an operating license – including a reasonable assurance that the facility can be operated safely without endangering the health and safety of the public." Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 952 (1974) ("Indian Point").[15] In Public Service of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313 (1978) ("Marble Hill"), the Appeal Board found that loan guarantee and financial qualification issues could not be left over for post-hearing resolution. 7 NRC at 318. Similarly, in this case, the controversy surrounding PFS's demonstration of financial assurance cannot be swept aside in a closeted post-hearing determination without any participation or scrutiny by the Intervenor or the public.

In LBP-00-06, the Board rejects the Indian Point and Marble Hill precedents on

[15]Indian Point further cautions that post-hearing resolution "should be employed sparingly and only in clear cases." Id. When there are "unresolved aspects" of a licensing review, post-hearing resolution is only suitable for "minor procedural deficiencies." Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 543-544 (1983), *quoting* Consolidated Edison Company of New York, 7 AEC at 951-952 and note 8 (minor deficiencies in nonsafety-related equipment program can be resolved by the Staff post-hearing).

the ground that Claiborne suggests a "broader view of the matter." LBP-00-06, at 29. The Commission's decision in Claiborne cannot be read to reverse these well-established precedents which set forth the limits on the NRC's ability to restrict the scope of the licensing hearing guaranteed by the Atomic Energy Act. The Board also failed to consider the nature of the decisions being relegated to post-hearing inspections, and whether, as described in Part B.2 below, the agency judgments that must necessarily be made during that review have been inappropriately delegated to the Staff.

2. The Licensing Board Inappropriately Delegated Material Licensing Issues to the Inspection Staff for Post-hearing Resolution.

The determination regarding whether license conditions have been met involves important, substantive judgments that should be made by the Licensing Board and the Commission in a hearing in which the State has an opportunity to participate. They are not ministerial decisions that can be made by inspecting staff. For example, the Licensing Board relied on PFS's commitment to allocate liability and responsibility for fuel in its Service Agreements. LBP-00-06 at 49, 72-73. However, the Licensing Board's decision foreclosed a hearing on whether PFS's actual allocation of financial responsibility provides reasonable assurance of funding. When the inspector reviews PFS's Service Agreements to determine whether PFS has complied with license conditions, the inspector will face some difficult questions. Will any allocation of liability and responsibility be sufficient, or will the inspector be evaluating the appropriateness of that allocation? Is the allocation of liability adequate if it addresses some matters, *e.g.*,

liability or responsibility for damaged casks, but not others, *e.g.*, liability or responsibility for damages from accidents? If PFS retains some of the liability and responsibility in that allocation, will the inspector then go to the next step and determine whether PFS has sufficient funding and insurance to meet its obligations under that allocation? How will the inspector evaluate the risk associated with that liability? *See* State Contention E, Basis 5 and Sheehan Decl 9.o. State's Disputed and Relevant Material Facts ("Facts") ¶ 5.

There are similarly complex questions for many other matters that the inspector will be required to review under the Board's decision:

- In evaluating the adequacy of PFS's anticipated income stream, how much income is adequate relative to obligations? Will the inspector require a margin of financial safety in order to prevent PFS from operating hand-to-mouth, thereby encouraging cutting corners? What liabilities and obligations will the inspector consider? Debt servicing? Lease payments to the Goshutes? *See* State of Utah Contention E, Bases 2, 3, 4, 6, and 8 and Sheehan Decl. ¶¶ 9a, 9b, 9e, 9j, 9k, 10; Facts ¶¶11, 12, 24, 26, 32, 33, 46, 70, 71.

- The length of time PFS will be storing spent nuclear fuel impacts the operation and maintenance costs. What will an inspector assume about when a permanent repository will be ready for use? Will the inspector assume that wastes stored at PFS will go to such a repository immediately upon its opening, or that the repository will accept other wastes first? *See* Fact ¶ 34; Sheehan Decl. ¶12.

- PFS has not provided for any costs associated with default of customer payment

obligations or with the demise of a corporate customer. It relies instead upon its commitment to perform reviews of customer financial health and make appropriate follow up. An inspector reviewing PFS's performance on this matter will have many questions to answer. How much of an effort must PFS make to evaluate its customers' financial health to ensure a continued and adequate income stream? What efforts must it make to correct any inadequacies? What adjustments must be made in the event PFS fails to correct such inadequacies? Will PFS be required to cover the cost of disposal of orphaned waste, and therefore to make appropriate adjustments to its cost estimates? What assumptions will the inspector make about the availability of a permanent repository in making any such cost adjustments? *See* State Contention E, Basis 9 and, *e.g.*, Facts ¶¶ 30, 31, 35, 60, 72-77. *See also* Sheehan Decl at ¶ 13,

- PFS has indicated that Service Agreements will contain cost escalators, the accuracy of which will decrease as the projections get further away in time. What will the inspector assume is the start-up date for facility construction? What escalators will the staff inspectors accept? *See* Sheehan Dec. at ¶¶ 9.h. and i.

The Licensing Board rejected the argument made by the State that the proposed License Conditions are too vague and ambiguous to provide reasonable assurance that financial qualifications will be met, relying largely on the Commission's acceptance of similar license conditions in Claiborne. However, as the Commission has previously observed, financial qualifications must be considered in a case-by-case basis. The above analysis of only a few of the questions that will be faced by an inspector reviewing PFS's

compliance with commitments shows that, in this case, the License Conditions leave unanswered far too many questions – important and complex financial questions that go to the core of PFS's financial qualifications, not merely implementing details that may be checked off by a staff inspector. The State is legally entitled to an opportunity to address these issues in a contested hearing.

C. The Board's Decision Granting Summary Disposition Should Be Overturned Because the Board Overlooked Significant Issues of Material Fact.

In its contention the State asserts that essential elements to a reasonable assurance showing include information concerning PFS members and their relationship (basis 1); documentation of a sufficient financial base and the potential for termination (basis 2); documentation relating to financial strength (basis 3); a statement of assets, liabilities, and capital structure (basis 4); allocation of legal and financial responsibility between spent fuel owners and PFS (basis 5); documentation of a storage market and a showing that storage commitments will fund the facility (basis 7); documentation debt financing is viable (basis 8); addressing funding contingencies for customer non-payment (basis 9); and assurances that non-routine expenses will be covered (basis 10). *See* Exh. 1. In the State's Response to the Applicant's Partial Motion for Summary Disposition and the State's Reply to the Staff's Response to the Applicant's Motion for Summary Disposition the State identifies numerous disputed and material facts with respect to bases 1 through

5, 7 through 10.[16]

The Licensing Board ignored many of the State's material facts and dismissed bases 2, in part, 3, 4, and 7, on the grounds that, in light of the Applicant's commitments and the license conditions, the bases are no longer material to a reasonable assurance finding. The record before the Staff and the Licensing Board is totally inadequate and thus, a determination that the Applicant is financially qualified cannot be made. The State, therefore, urges the Commission to overturn the Licensing Board's decision.

The Licensing Board also dismissed the States's factual dispute concerning the makeup of PFS members as immaterial because if there is a funding shortage due to the number of members, PFS may not begin construction. LBP-00-06 at 36-37. However, the Licensing Board's reasoning does not support a pre-licensing reasonable assurance showing. Moreover, the actual membership makeup of PFS is material to the extent that PFS relies upon the uncommitted financial resources of its individual members.[17]

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[16] For all bases, *see* State Response, Disputed and Material Facts at ¶¶ 8-38, Sheehan Dec. at ¶¶ 6-9, 12. Additionally for basis 1, *see* State Response, Disputed and Material Facts at ¶¶ 39- 44, Schlissel Dec. at ¶¶ 5-7, Sheehan Dec. at ¶ 19. Additionally for basis 2, *see* State Response, Disputed and Material Facts at ¶¶ 45-54, Sheehan Dec. at ¶¶ 14, 15, 21. Additionally for basis 3, *see* State Response, Disputed and Material Facts at ¶¶ 55-57, Sheehan Dec. at ¶¶ 11, 12, 14, 15, 21. Additionally for basis 4, *see* State Response, Disputed and Material Facts at ¶ 58. Additionally for basis 5 and 10, *see* State Response, Disputed and Material Facts at ¶¶ 59-67, Sheehan Dec. at ¶¶ 10, 22, 23, Sinclair Dec. Additionally for basis 7, *see* State Response, Disputed and Material Facts at ¶¶ 68-71, Sheehan Dec. at ¶¶ 11, 15-19, 21. Additionally for basis 8, *see* State Response, Disputed and Material Facts at ¶¶ 70-71. Additionally for basis 9, *see* State Response, Disputed and Material Facts at ¶¶ 72-77, Sheehan Dec. at ¶¶ 13, 20 .

[17] The Staff states that PFS's claims that its own members will use a significant portion of the storage facility "provides a considerable degree of assurance that a base level of revenue to meet operating and maintenance (O&M) costs is likely to be available from the members themselves." SER at 17-4. The Staff also states that PFS members "have substantial assets and financial resources so that, in the aggregate, they could provide adequate funding" for the ISFSI. SER at 17-4. However, there is nothing in the record that supports the Staff's conclusions.

In dismissing the question of early voluntary termination (basis 2), need for sufficient financial documentation (basis 3), allocating legal and financial responsibility (basis 5), adequacy of offsite liability insurance (basis 5 and 10), and customer non-payment (basis 9) the Licensing Board placed its reliance on the Applicant's promises made in the license application and RAI responses, including its intent to place certain contractual requirements in its service agreements.[18] The record lacks any evidence to support the assertions beyond the Applicant's mere promises. In addition to executing the promises, the service agreements are the main crux of the Applicant's reasonable assurance declaration in that the Applicant and the proposed license conditions rely on the service agreements to generate the bulk of funding. Thus, an evaluation of the terms and conditions of the service agreements and other financial documents are crucial to a financial qualification determination.

In fact, the Board took notice of the Staff's determination that adequate financial documentation is necessary to support a reasonable assurance finding. As the Board notes, the Staff concluded that:

> because PFS has not provided copies of each member's executed Subscription Agreement, and because PFS has provided neither blank forms of Service Agreements nor copies of any executed Service 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).

LBP-00-06 at n. 8 (citing NRC Staff's Statement of Its Position Concerning Group I-II

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[18] The Licensing Board, substantiated the significance to a reasonable assurance determination, by identifying the PFS commitments it relied upon in its order. LBP-00-06 at 73-74.

Contentions (December 15, 1999) at 4) (emphasis added). However, the Staff and the Licensing Board believe a post-license evaluation of financial documentation is acceptable.[19] Also, the Licensing Board considered the terms and conditions of the service agreements to be "implementing details" and did not "find the lack of any existing 'draft' agreements [] material to the requisite reasonable assurance finding."[20] LBP-00-06 at 40. Financial documents, including service agreements, are not mere "implementing details" but the means with which the Applicant proposes to provide reasonable assurance of funding the facility. 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.[21] For example, a contract allocating some financial responsibility does not support reasonable assurance unless the distribution of responsibility is adequate to cover all costs. Moreover, as discussed above, the post-licensing review of key financial documents denies the State the opportunity to participate in the financial assurance determination and in appropriately abdicates the reasonable assurance determination to the discretion of an inspector. Thus, a reasonable assurance finding cannot occur absent specific license requirements and a pre-licensing review of the key financial documents, including service agreements.

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[19] The Staff believe that the lack of sufficient documentation will be resolved once the Applicant, post-license, complies with the proposed license conditions, supported by adequate documentation. NRC Staff's Statement of Its Position Concerning Group I-II Contentions at 4. The Licensing Board indicated the Staff's post-licensing deferral is acceptable. LBP-00-06 at fn. 8.

[20] PFS draft service agreements have been withheld from the Staff and the State.

[21] In fact, the license conditions fail to even require the Applicant's commitments.

Because of a lack of showing that the spent fuel shipments are contemplated or likely, the Licensing Board disregards the State's assertion that transfers between a Part 72 ISFSI to a non-part 50, non-DOE facility may not be covered by the Price Anderson Act and, thus, the Applicant has not provided assurances that non-routine expenses will be covered as alleged in basis 10. LBP-00-06 at 61. The Board erred in requiring the State to show the likelihood of shipments because the record must be viewed in the light most favorable to the opposing party. Moreover, there is a reasonable likelihood that spent fuel stored in a PFS member's part 72 ISFSI will be transferred to the PFS ISFSI.[22]

Finally, the Board ignored the problems that would arise as a result of the multiple financial assurance determinations that would have to be made as PFS used the flexibility of the license conditions to increase storage at the facility beyond its initial capacity. LBP-00-06 at 34. The proposed license conditions could shift those determinations, which will be made by staff inspectors outside of the adjudicative process, to the next decade or beyond. As a result, it is not possible at this time to know what will be sufficient at the time the Staff makes its decision. State Response, Sheehan Dec. ¶ 9.h.

IV. CONCLUSION

The Licensing Board's ruling deprives the financial qualification regulations of any meaning, and also undermines the hearing to which the State is entitled. Accordingly, the Board should be reversed.

DATED this 5th day of April, 2000.

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[22] Northern States Power is a member of PFS that currently stores spent fuel in a part 72 ISFSI.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of 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 was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 5th day of April, 2000:

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In the Matter of Private Fuel Storage, L.L.C.,
(Independent Spent Fuel Installation)
Docket No. 72-22-ISFSI
ASLB No. 97-732-02-ISFSI
Utah E/Castle Rock 7/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.

LBP-98-07, Appendix A.