

RAS 1687

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USING

'00 MAY -3 A9:57

BEFORE THE COMMISSION

ORIGINAL FILED IN
RECORD ROOM
ADJUTANT GENERAL'S OFFICE

In the Matter of:)	Docket No. 72-22-ISFSI
)	
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	April 24, 2000

**STATE OF UTAH'S REPLY BRIEF TO THE COMMISSION
REGARDING THE LICENSING BOARD'S GRANT OF
SUMMARY DISPOSITION OF BASES UNDER UTAH
CONTENTION E/CONFEDERATED TRIBES CONTENTION F**

Denise Chancellor, Assistant Attorney General
Fred G Nelson, Assistant Attorney General
Connie Nakahara, Special Assistant Attorney General
Diane Curran, Special Assistant Attorney General
Laura Lockhart, Assistant Attorney General
Attorneys for State of Utah
Utah Attorney General's Office
160 East 300 South, 5th Floor, P.O. Box 140873
Salt Lake City, UT 84114-0873

Template = SECY-021

SECY-02

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
I. COMMISSION REVIEW OF THE LICENSING BOARD'S REFERRAL OF ITS SUMMARY DISPOSITION RULING IS WARRANTED BECAUSE THE BOARD'S DECISION RAISES LEGAL AND POLICY ISSUES THAT ARE IMPORTANT AND NOVEL	1
II. <u>CLAIBORNE</u> IS NOT CONTROLLING AND EVEN IF IT WERE, THE STAFF'S APPROACH AND THE BOARD RULING DO NOT EVEN CONFORM WITH <u>CLAIBORNE</u>	3
A. The Financial Assurance Requirements in Part 72 are More Like Part 50 than Part 70	3
B. The Board's Ruling Upholding the Staff's Approach to Financial Assurance Under Part 72 Does Not Even Conform with <u>Claiborne</u>	4
III. THE STATE OF UTAH'S STATUTORY HEARING RIGHTS HAVE BEEN VIOLATED BY THE BOARD'S DECISION	8
A. The Applicant and the Staff Have Not Refuted the State's Argument That Under <u>Union of Concerned Scientists</u> a Hearing is Required	8
B. Post-hearing Proceedings Are Acceptable Only if Judgments Are Based on Objective, Technical Criteria Established During License Review	10

IV.	THE PROPOSED LICENSE CONDITIONS ARE INADEQUATE TO PROVIDE REASONABLE FINANCIAL ASSURANCE FOR A 4,000 CASK AWAY-FROM-REACTOR ISFSI, OPERATED BY LIMITED LIABILITY COMPANY WITH NO CAPITAL AND LOCATED CROSS COUNTRY FROM MOST REACTOR SITES	12
	CONCLUSION	15

TABLE OF AUTHORITIES

CASES

<u>Bellotti v. NRC</u> , 725 F.2d 1380 (D.C. Cir. 1983)	9, 10
<u>Cleveland Electric Illuminating Co.</u> (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 N.R.C. 315 (1996)	10, 11
<u>Consolidated Edison Company of New York, Inc.</u> (Indian Point Station, Unit 2), CLI-74-23, 7 A.E.C. 947 (1974))	11
<u>Curators of the University of Missouri</u> , CLI-95-1, 41 N.R.C. 71 (1995)	12
<u>Louisiana Energy Services, L.P.</u> (Claiborne Enrichment Center), CLI-96-8, 44 N.R.C. 107 (1996)	12
<u>Louisiana Energy Services, L.P.</u> (Claiborne Enrichment Center), LBP-96-25, 44 N.R.C. 331 (1996)	6, 7
<u>Louisiana Energy Services, L.P., (Claiborne Enrichment Center)</u> , CLI-97-15, 46 N.R.C. 294 (1997)	<i>passim</i>
<u>Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3)</u> , ALAB-732, 17 N.R.C. 1076	11, 12
<u>Massachusetts v. NRC</u> , 924 F.2d 311 (D.C. Cir. 1991)	8
<u>NIRS v. NRC</u> , 969 F.2d 1169 (D.C. Cir. 1992)	10
<u>Private Fuel Storage, L.L.C.</u> (Independent Spent Fuel Installation), LBP-00-6, 51 N.R.C. __, slip op. (2000)	2, 4, 13, 14
<u>Public Service Co. of New Hampshire, et al., (Seabrook Station, Units 1 and 2)</u> , ALAB-734, 18 N.R.C. 11 (1983)	12
<u>Public Service Company of Indiana, Inc.</u> (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 N.R.C. 313 (1978)	11

<u>Safety Light Corp., et al. (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 N.R.C. 79 (1992)</u>	3
<u>Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984)</u>	8
<u>Union of Concerned Scientists v. NRC, 920 F.2d 50 (D.C. Cir. 1990)</u>	10

FEDERAL REGULATIONS AND CODES

10 C.F.R. §§2.764(c)	2
10 C.F.R. § 2.786(b)(4)	3
10 C.F.R. § 2.786(g)	3
10 C.F.R. § 50.33(f)(1) and (2)	4
10 C.F.R. § 70.22(a)(8)	4
10 C.F.R. § 72.22	2, 4, 8, 12, 13
10 C.F.R. § 72.46(d)	2

MISCELLANEOUS

"Statement of Policy on Conduct of Adjudicatory Proceedings," CLI-98-12, 48 N.R.C. 18 (1998)	4
---	---

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:

PRIVATE FUEL STORAGE, LLC
(Independent Spent Fuel
Storage Installation)

)

)

)

)

)

)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

April 24, 2000

**STATE OF UTAH'S REPLY BRIEF TO THE COMMISSION
REGARDING THE LICENSING BOARD'S GRANT OF
SUMMARY DISPOSITION OF BASES UNDER UTAH
CONTENTION E/CONFEDERATED TRIBES CONTENTION F**

In accordance with the Commission's March 24, 2000 Order, the State of Utah hereby submits its Brief in reply to Briefs filed by the Staff and Private Fuel Storage, LLC ("PFS" or "Applicant") on April 17, 2000. Review of the Licensing Board's decision is warranted for several reasons. The Board's ruling relies on Louisiana Energy Services, L.P., (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997) ("Claiborne"), but Claiborne is not controlling and even if it were the facts and legal requirements in the PFS case do not conform with Claiborne. Furthermore, by endorsing a post-license determination of financial assurance, the Board's ruling violates the State's hearing rights. Finally, there are good policy reasons, given the size, location and nature of the proposed ISFSI, that the Commission should overturn the Board's ruling.

I. Commission Review of the Licensing Board's Referral of its Summary Disposition Ruling Is Warranted Because the Board's Decision Raises Legal and Policy Issues That Are Important and Novel.

The Licensing Board referred its Summary Disposition decision on Contention

Utah E to the Commission because at the heart of the Board's decision "is the legal question of the application and interpretation of the reasonable assurance standard of 10 C.F.R. § 72.22(e) in light of the Commission's financial assurance ruling in Claiborne." LBP-00-06, slip op. at 71. The fact that the Licensing Board has referred its summary disposition decision to the Commission is indicative of the important legal and policy questions at issue. Moreover, the Staff agrees that it is appropriate for the Commission to take review of the Licensing Board's ruling under the Commission's inherent supervisory authority. Staff Br. at 9.

The State's brief maintained that if the Commission does not review the Board ruling, the State will not be able to show that it is entitled to a full evidentiary hearing until after the license has been issued. Ut Br. at 4. The State disagrees with the Staff's assessment that based on 10 CFR §§ 2.764(c) and 72.46(d) the State could challenge the Board's decision prior to issuance of a license to PFS. Staff Br. at 8. While 10 CFR §§ 2.764(c) and 72.46(d) do not allow the Staff to issue a license to an away-from-reactor ISFSI until expressly authorized by the Commission, those provisions do not *ipso facto* stay the issuance of a license. Consequently, the State will be deprived of its hearing rights because the Staff and the Board have approved the deferral of fundamental financial assurance determinations until post-license seriatim Staff review of the Applicant's license conditions and commitments.

While disagreeing that the Board's ruling merits review, the Applicant, nonetheless, acknowledges that the Commission has authority to review the Board's

ruling. PFS Br. at 9. The State disagrees with the implication in the Applicant's brief that for the Commission to take discretionary review of the Board ruling, the factors in 10 CFR § 2.786(g) must be met. PFS Br. at 7-8. The Commission "adhere[s] as a general rule to the stringent standards for interlocutory review which are codified in 10 C.F.R. § 2.786(g)." Safety Light Corp., et al., (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85 (1992) (*emphasis added*). Regardless of whether the Commission in Safety Light found that a pervasive effect on the structure of the proceeding, the Commission nonetheless noted that its "supervisory power extends to circumstances that do not meet the standards for review under 10 C.F.R. §§ 2.786(b)(4) and (g)." *Id.* at 86. *See also* PFS Br. at 7 n.18. Moreover, the Applicant's position makes a nullity out of the Commission directive encouraging boards "to certify novel legal or policy questions relating to admitted issues to the Commission as early as possible."¹

II. Claiborne Is Not Controlling and Even If it Were, the Staff's Approach and the Board Ruling Do Not Even Conform with Claiborne.

A. The Financial Assurance Requirements in Part 72 Are More Like Part 50 than Part 70.

The Staff and PFS rely on Claiborne and PFS's proposed license conditions as satisfying all the financial requirements of Part 72, with the exception of litigating construction and operating costs. *See e.g.*, Staff Br. at 9-10; PFS Br. at 10-13. Part 72 was carved out of Part 70 in 1980, and thus, is distinguishable from Part 70. Ut. Br. at

¹ "Statement of Policy on Conduct of Adjudicatory Proceedings," CLI-98-12, 48 NRC 18, 23 (1998).

10-11. Also, it is apparent from the financial assurance requirements in Parts 50, 70 and 72 that the wording in Part 72 is more akin to Part 50 than it is to Part 70. *Cf* § 72.22(e) with §§ 50.33(f)(1) and (2) and 70.22(a)(8). *See also* Ut. Br. at 9-10. While the State is not advocating that Part 50 applies to a Part 72 facility, the State does urge the Commission to take this appeal and establish a standard that is more rigorous than Part 70 but perhaps less rigorous than Part 50. Given the difference in the wording of three regulations, Claiborne, decided under Part 70, should not be considered a binding precedent for a Part 72 facility.

B. The Board's Ruling Upholding the Staff's Approach to Financial Assurance Under Part 72 Does Not Even Conform with Claiborne.

Even if Claiborne is controlling on a Part 72 facility, the Staff's approach, as endorsed by the Board, falls short of the circumstances in Claiborne. The Staff accepted two separate license conditions (LC 17-1 and 17-2) as the way in which PFS could meet 10 CFR § 72.22. LC 17-1 does not allow construction to commence until committed equity, revenue and debt funding is adequate to construct an initial capacity facility.² Construction of additional capacity may occur after PFS commits funding to cover those construction costs. *See* Reissued Safety Evaluation Report (SER) at 17-7; LBP00-06, slip op. at 14-15. LC 17-2 ties operation of the facility to PFS having long-term service agreements in place to cover operational costs for the term of the service agreements. *Id.*

There is a significant difference in substance between the license conditions in

² PFS's license application refers to a nominal design capacity of 15,000 MTU (LA, Rev. 6 at 1-7) but the Staff deems the initial capacity in LC 17-1 to be confidential. Reissued SER at 17-3.

Claiborne³ and those proposed for the PFS facility. First, in Claiborne, before construction may begin, the applicant must have thirty percent of the project costs in hand and have firm commitments for the remaining project costs. Under LC-17-1, there is no requirement for PFS to have any funds in hand. Instead, PFS may “commit” funds from a mix of any or all of the following: equity, revenue or debt. When the SER was originally issued, the Staff imposed license conditions on PFS almost identical to those in Claiborne but required PFS to have only \$6 million (6%) construction costs in hand. Original SER at 17-7.⁴ Currently, PFS anticipates that it will raise \$6 million in cash for construction but there is no binding obligation for it to do so. LA, Rev. 6 at 1-5. Second, Claiborne refers to “project costs” whereas LC 17-1 refers to “construction costs.”⁵ Third, Claiborne prohibited the applicant from proceeding with the project unless and until it has in place long-term enrichment contracts with prices sufficient to cover both construction

³ In Claiborne, 46 NRC at 308, the Commission ruled that LES must meet the following conditions prior to constructing or operating the uranium enrichment facility:

1. Construction of the CEC shall not commence before funding is fully committed. Of this full funding (equity and debt), LES must have in place before constructing the associated capacity: (a) a minimum of equity contributions of 30% of project costs from the parents and affiliates of the LES partners (e.g., in escrow, on deposit, etc.); and (b) firm commitments ensuring funds for the remaining project costs.
2. LES shall not proceed with the project unless it has in place long-term enrichment contracts with prices sufficient to cover both construction and operating costs, including a return on investment, for the entire term of the contracts.

⁴The original SER, issued December 15, 1999, specified two license conditions. The license conditions were revised and reissued on January 4, 2000.

⁵ “Project costs” are not defined in Claiborne but by reading the two license conditions together, projects costs are something more than construction costs.

and operating costs, including a return on investment. LC 17-2 completely separates the funding of construction costs from operating costs; it only requires contracts in place to cover the operation, maintenance and decommissioning costs; and it does not require a return on investment.⁶ The significant legal distinctions between the license conditions in Claiborne and those proposed for PFS negate the Applicant and the Staff's arguments that Claiborne supports the Licensing Board's summary disposition decision.⁷

There are also significant factual differences between Claiborne and PFS. In Claiborne most of the costs were capital costs rather than operational costs; cost estimates (in 1990 dollars) were: direct capital costs \$855 million; decommissioning costs \$409 million; total costs \$1.6 billion.⁸ In contrast, most of the costs at PFS are on the operational side. Construction costs are estimated at \$100 million whereas annual operating and maintenance costs are estimated to be \$49 million per year (20 years) or \$31 million per year (40 years). LA, Rev. 6 at 1-7. Total operating and maintenance costs will be \$980 million (20 years) or \$1.24 billion (40 years).

Another significant factor is that the applicant in Claiborne committed not to

⁶ For such a cash strapped entity as PFS, the ability to acquire liquid assets may be important.

⁷ Other requirements in Claiborne that are not required of PFS include the requirement that the applicant annually submit to the Staff financial statements and changes to construction or operating budgets. Claiborne, 46 NRC at 308 n.20. Also, any changes in ownership would require a license amendment to add additional new partners. Id. at 305.

⁸ See Louisiana Energy Services, L.P., (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 335-336 (1996). "The total investment, in 1990 dollars, including direct construction, interest escalation, capitalized interest, contingency, replacement centrifuges, decontamination, and decommissioning is estimated at \$1.6 billion." Id. at 336.

proceed with the first phase of construction or operation unless it has contracts in place for all, or at least two-thirds of the plant's capacity.⁹ PFS will only be required to commit to funding an "initial capacity facility." This capacity is expected to be somewhere between 10,000 to 15,000 MTUs.¹⁰ Thus, PFS will be financing 94% of construction costs and 100% of operation and decommissioning costs with service agreements.¹¹

Finally, in Claiborne there was a full adjudicatory hearing where testimony was presented on issues such as marketing and debt-to-equity ratio. Claiborne, 44 NRC at 336. The Board's summary disposition ruling has precluded a hearing of such issues. Moreover, the State has been thwarted in its discovery efforts. PFS has refused, on numerous occasions, to answer the State's discovery relating to the admitted bases for Contention Utah E;¹² instead, PFS responded that license conditions make the State's discovery requests irrelevant.

In sum, the legal requirements and the factual circumstances in Claiborne bear no relationship to those in PFS. Thus, Claiborne does not support the Board's decision.

⁹ Claiborne, 46 NRC at 304 n.12.

¹⁰ The license application refers to a nominal capacity of 15,000 MTU. LA Rev. 6 at 1-7. There is also reference to constructing the pads in three stages: Phase 1, the SE quadrant (10,000MTU); Phase 2, the SW quadrant (10,000 MTU); and Phase 3, the northern half (20,000MTU). ER Rev 2, at 3.2-2.

¹¹ Some construction costs may be funded through debt financing. See LC 17-1. As noted above, PFS anticipates it will raise only \$6 million or 6% in cash to fund construction costs.

¹²See State of Utah's Motion to Compel Applicant to Respond to State's Fourth Set of Discovery Requests (December 14, 1999); Utah's Motion to Compel Applicant to Respond to State's Eighth Set of Discovery Requests (January 18, 2000); Utah's Motion to Compel Applicant to Respond to State's Ninth Set of Discovery Requests (February 7, 2000).

III. The State of Utah's Statutory Hearing Rights Have Been Violated by the Board's Decision.

A. The Applicant and the Staff Have Not Refuted the State's Argument That Under Union of Concerned Scientists a Hearing Is Required.

The Applicant argues that all issues material to PFS's satisfaction of 10 CFR § 72.22 have been met because the proposed license conditions are in accordance with the Commission's regulations and as interpreted and applied by Claiborne. PFS Br. at 20-21. As discussed in Part II above, Claiborne is not controlling on a Part 72 licensee and even if it were, the circumstances and license conditions in PFS's case do not conform to Claiborne. Furthermore, the cases cited in support of its argument – that the Commission may define the scope of a party's hearing rights simply by holding an issue to be immaterial – do not sustain its position. *See* PFS Br. at 20-21. They are either inapplicable or much narrower than the Applicant would like to believe and none casts doubt upon the State of Utah's reliance on Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1446 (D.C. Cir. 1984). *See* State Br. at 16-17.

In Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991) the court agreed that the Commission could choose one methodology for evaluating safety over another, and could refuse to hear testimony relating to the implementation of the rejected methodology. Evidence was adduced at a hearing regarding the implementation of the preferred methodology, however. *See*, for example, discussion of Board findings regarding sheltering of beach populations, *id.* at 329. Therefore, the case cannot be said to stand for the proposition that the NRC may choose not to hear any site-specific evidence about the

implementation of a significant license requirement such as the adequacy of emergency plans or financial assurance obligations and, thus, dismiss an admitted contention from proceeding to an adjudicatory hearing.

In Bellotti v. NRC, 725 F.2d.1380 (D.C. Cir. 1983), an appeal was brought by the Attorney General of Massachusetts who had sought intervention in an NRC enforcement proceeding,¹³ and who had also sought to expand the scope of that hearing.¹⁴ The case was brought as an enforcement action to require the licensee to amend its license and as such the applicability to licensing was recognized, although not in a manner that supports the Applicant's argument. PFS Br. at 20. Bellotti clarified that its holding would not allow the Commission to deny a hearing except where NRC was seeking to amend a license to improve safety. Bellotti, 725 F.2d. at 1383.

Bellotti does not allow the result Applicant seeks. First, it does not deal with the dismissal of an admitted Intervenor, such as the State of Utah, to a licensing proceeding. Second, Bellotti states that public participation is automatic with respect to all Commission actions that are potentially harmful. Id. Third, as discussed above, Bellotti does not sustain PFS's argument that NRC may simply decide a matter is not important enough to merit examination in the hearing process. PFS Br. at 20 (*quoting* Bellotti, 725

¹³ NRC issued the licensee an Order to modify its license because of deficiencies at the Pilgrim plant and also imposed civil penalties on the licensee. Bellotti, 725 F.2d. at 1381.

¹⁴ The Intervenor challenged, *inter alia*, the adequacy of the licensee's reappraisal plan and the plant's continued operation. Bellotti, 725 F.2d. at 1381.

F.2d at 1381).¹⁵

In sum, failure to consider any evidence of an applicant's financial ability violates the State hearing rights under Section 189A of the Atomic Energy Act and falls outside NRC's authority to limit the materiality of the hearing.

B. Post-hearing Proceedings Are Acceptable Only if Judgments Are Based on Objective, Technical Criteria Established During License Review.

The State does not argue that post-hearing review of compliance with license conditions is never appropriate, and agrees that NRC case law supports the principle that the Staff may be used for post-hearing verification of license conditions – but only if verification is based on objective, technical criteria established during license review. The principle is clearly described in a case cited by the Applicant, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315 (1996)).¹⁶ There, the Commission determined that post licensing assessments made on “objective, technical, and preestablished criteria” are within the Staff's technical expertise and its regulatory oversight role. Perry Nuclear, 44 NRC at 330. It added that:

¹⁵ The Applicant also cites NIRS v. NRC, 969 F.2d 1169, 1174 (D.C. Cir. 1992)(en banc), which in turn quotes Union of Concerned Scientists v. NRC, 920 F.2d 50, 54 (D.C. Cir. 1990) (“UCS”), for the proposition that the NRC may determine what matters are material enough to warrant hearing. See PFS Br. at 20 n.34. Those cases do state that section 189(a) prohibits the NRC from denying a hearing for an issue “it agrees is material” to the decision. However, the quoted portion of the statement is description; it is not a statement of the NRC's authority. See NIRS, 969 F.2d at 1174, and UCS, 920 F.2d at 54. In fact, the limits to the Commission's discretion was explicitly recognized by the NIRS court in a clarifying footnote: “The NRC's determinations as to what issues are material to its licensing decisions are, of course, subject to judicial review. See [UCS, 920 F.2d] at 55.” NIRS, 969 F.2d at 1174 n.2.

¹⁶ The Applicant cited Perry Nuclear for the proposition that using NRC Staff for post-hearing verification of license conditions is acceptable practice. PFS Br. at 21 n. 35.

Confirming compliance with a self-implementing, detailed, industry standard does not call into play the various common reasons for requiring an adjudicatory hearing . . . , such as the need to weigh various parties' observations or the utility of cross-examination. Id.

Another case cited by the Applicant, Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 318 (1978) found that verification of compliance with financial assurance is not a matter that should be delegated to the staff. PFS Br. at 21 n.35. The Appeal Board found that "some circumstances [may] be left to the Director to cure, but the loan guarantee and . . . financial qualifications are not of that genre." Id. 7 NRC at 318. In doing so, it emphasized that "delegating open matters [such as review of the applicant's loan guarantee and ownership participation agreement] to the staff for posthearing resolution is a practice frowned upon by both the Commission and [the Marble Hill] Board."¹⁷

Finally, the NRC cases that the Applicant uses to argue that various licensing issues are "resolved by binding commitments" do not support that contention. PFS Br. at 22. For example, although the Board in Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076 (1983), found that emergency plan implementing procedures could be evaluated by NRC staff post-hearing it based that decision on its finding that the Commission never intended the procedures to be subject to scrutiny during a hearing because of a specific rule allowing the submission of such

¹⁷ See also Consolidated Edison Company of New York, Inc., (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 951 n.8 (1974)) (a plan with "minor procedural deficiencies" could be cured post license under the scrutiny of the Director of Regulation).

information prior to license issuance. *Id.* at 1106-07. In contrast, 10 CFR § 72.22 requires financial information to be submitted with a Part 72 license application.¹⁸

Accordingly, case law only sustains a post license review if the judgments are based on objective, technical criteria.

IV. The Proposed License Conditions Are Inadequate to Provide Reasonable Financial Assurance For a 4,000 Cask Away-From-Reactor ISFSI, Operated by Limited Liability Company with No Capital and Located Cross Country from Most Reactor Sites.

The license conditions announced in the SER are an inadequate and inappropriate substitute for a pre-licensing determination whether this Applicant is financially qualified to construct, operate and decommission a 4,000 cask centralized away-from-reactor ISFSI. Furthermore, the Staff's substitute of license conditions for a pre-license determination of the Applicant's financial qualifications offers no assurance to the State or its citizens that a massive nuclear storage facility in Utah will be able to meet its

¹⁸ The other cases cited by Applicant are also inapposite. For example, in Public Service Co. of New Hampshire, et al., (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 14 (1983), the Appeal Board did, as Applicant indicates, accept prior to license issuance a post-hearing review of quality assurance procedures. But the Appeal Board stated that the intervenor's "opportunity to challenge the adequacy of the applicant's quality assurance procedures would not hinge upon whether the procedures were fully spelled out [in the initial document] or, rather, were reserved from a later-issued manual and determined that intervenor's could file late-filed contentions based on the actual procedures. *Id.* at 15-18.

In, Claiborne, CLI-96-8, 44 NRC 107 (1996), the Commission determined that a post-hearing clarification of the description of fire brigade roles and training was sufficient to address a conflict in hearing evidence. *Id.* at 108-10. The Commission did base its decision on a commitment to provide a description of roles and training but it relied on an actual description to meet the rules. *Id.* More importantly, the issue was resolve prior to license issuance and the Commission found that the Licensing Board erred when it left the fire brigade issue for post hearing resolution by the Staff. *Id.* at 108.

In Curators of the University of Missouri, CLI-95-1, 41 NRC 71 (1995), the Commission found inconsistencies in defining emergency classes and action levels (*Id.* at 154-56) but granted two license amendments subject to various conditions, including the requirement to amend the applicant's emergency plan to address the inconsistencies. *Id.* at 172. However, the specific emergency plan amendments were stipulated and left little discretion to the applicant or NRC inspector.

financial obligations over a 20 or 40 year licensing term.

The Staff argues that 10 CFR § 72.22(e) does not “explicitly require” an applicant to provide documents, such as service agreement with customers, to show it is financially qualified. Staff Br. at 25. Section 72.22 is titled “Contents of application: General and financial information” and each application must state

information sufficient to demonstrate to the Commission the financial qualifications of the applicant to carry out ... 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...

10 CFR § 72.22(e). The wording of section 72.22 clearly does not allow the Staff, as it has in this case, to make a finding that the Applicant is financially qualified by relying on license conditions that are not backed up with any documentation of the Applicant’s financial qualifications. Such a practice has led the Staff to develop subjective standards post-licensing.

The Staff, the Applicant, and the Licensing Board point to the license conditions and other promises made by PFS to resolve all legal questions and factual issues raised by the State. *See e.g.* Staff Br. at 24;¹⁹ PFS Br. at 22-24; LBP-00-06 at 72-73. Although not a requirement of the proposed license conditions, PFS promises to embody in its customer contracts a commitment not to voluntarily terminate, an assignment of legal

¹⁹ In its Brief, the Staff, without explanation, attempts to uphold its Statement of Position that the applicant had supplied insufficient documents to support reasonable assurance by referring to the license conditions to resolve this seemingly conflicting position. Staff Br. at fn 28. Curiously, when the Staff issued its Position on December 15, 1999, the license conditions in the original SER were similar to those in Claiborne, not the license conditions as currently proposed by the Staff.

and financial responsibility, and a requirement for customers to provide financial information. LBP-00-06 at 72-73. These commitments are merely undocumented promises to address broad issues with no objective pre-established criteria against which an inspector may judge compliance.

The Applicant makes the absurd argument that review of PFS's compliance with its license conditions, and presumably commitments, would be mere "technical facts" to a Staff financial analyst. PFS Br. at 21 n.35. The Staff fiscal analyst may be versed in accounting but how would an inspector determine whether service agreement adequately address customer defaults or bankruptcy and allocation of liability among storage customers. Does the inspector look only at the four corners of the contract or may the inspector resort to parole evidence? Should service agreements be considered adhesion contracts? These are not "technical fact" to be determined by a fiscal analyst. They should be fully scrutinized during license review and hearing.

Reliance on PFS's commitments in meeting the financial assurance requirements is misplaced. For example, PFS's has supposedly committed not to pre-maturely terminate the corporation and to continue storage for the duration of storage contracts. The purpose of requiring a facility to demonstrate its financial viability is to assure that it will remain in business and do so with enough funding to meet its license obligation in a manner that does not threaten health or safety. There is no force behind a financial assurance requirement when an applicant is permitted to demonstrate that it will meet those commitments by simply making other unsupported commitments. Also, NRC is

impotent to require adherence to the license conditions or commitments through any of its enforcement tools. The only tools available to NRC are license suspension or revocation or imposition of civil penalties. Staff Br. at 19 n.23. The Staff refuses to come to grips with the plight of casks stored at the PFS site if the Staff were to revoke or suspend the ISFSI license. Such an action is not a realistic option in this case.

There appears to be little risk to PFS or its members if PFS dissolves for lack of funding or fails to meet its commitments. PFS is not capitalized and its utility members are shielded from liability by forming a limited liability company as the proposed ISFSI licensee. Civil penalties cannot be applied against a dissolved corporation with no assets. And a dissolved corporation also has no fear of license revocation. PFS members, therefore, have little at stake.

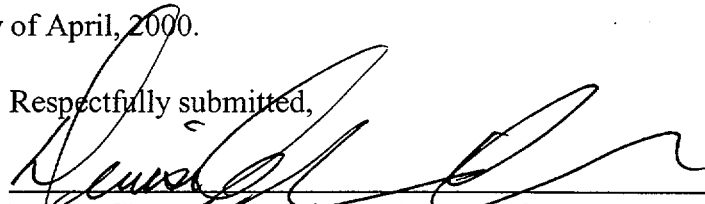
It is important for these reasons for the NRC to look beyond the commitments PFS has made and evaluate the financial ability PFS has or will have to meet them. There are sound policy reasons to reject naked license conditions as suitable for this facility given the corporate structure of the Applicant, the facility size and location, and the unprecedented movement cross-country of storage casks away from reactor sites. Accordingly, the State urges the Commission to overturn the Licensing Board's decision and remand the matter back to the Licensing Board for a full adjudicatory hearing.

CONCLUSION

For the foregoing reasons, the State urges the Commission to review and overturn Licensing Board's ruling.

DATED this 24th day of April, 2000.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Denise Chancellor", is written over a horizontal line.

Denise Chancellor, Assistant Attorney General

Fred G Nelson, Assistant Attorney General

Connie Nakahara, Special Assistant Attorney General

Diane Curran, Special Assistant Attorney General

Laura Lockhart, Assistant Attorney General

Attorneys for State of Utah

Utah Attorney General's Office

160 East 300 South, 5th Floor, P.O. Box 140873

Salt Lake City, UT 84114-0873

Telephone: (801) 366-0286, Fax: (801) 366-0292

DOCKETED
USNRC

CERTIFICATE OF SERVICE

*00 MAY -3 A9:57

I hereby certify that a copy of STATE OF UTAH'S REPLY 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
24th day of April, 2000:

Emile L. Julian, Assistant for
Rulemakings and Adjudications
Rulemaking & Adjudication Staff
Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington D.C. 20555
e-mail: hearingdocket@nrc.gov
(original and two copies)

Richard A. Meserve, Chairman
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: chairman@nrc.gov

Edward McGaffigan, Jr., Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: sfc@nrc.gov

Greta J. Dicus, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrdicus@nrc.gov

Nils J. Diaz, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrdiaz@nrc.gov

Jeffrey S. Merrifield, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: jmer@nrc.gov

G. Paul Bollwerk, III, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: gpb@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: jrk2@nrc.gov
E-Mail: kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: psl@nrc.gov

Sherwin E. Turk, Esq.
Catherine L. Marco, Esq.
Office of the General Counsel
Mail Stop - 0-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: set@nrc.gov
E-Mail: clm@nrc.gov
E-Mail: pfscase@nrc.gov

Jay E. Silberg, Esq.
Ernest L. Blake, Jr., Esq.
Paul A. Gaukler, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N. W.
Washington, DC 20037-8007
E-Mail: Jay_Silberg@shawpittman.com
E-Mail: ernest_blake@shawpittman.com
E-Mail: paul_gaukler@shawpittman.com


John Paul Kennedy, Sr., Esq.
1385 Yale Avenue
Salt Lake City, Utah 84105
E-Mail: john@kennedys.org

Joro Walker, Esq.
Land and Water Fund of the Rockies
2056 East 3300 South Street, Suite 1
Salt Lake City, Utah 84109
E-Mail: joro61@inconnect.com

Danny Quintana, Esq.
Danny Quintana & Associates, P.C.
68 South Main Street, Suite 600
Salt Lake City, Utah 84101
E-Mail: quintana@xmission.com

James M. Cutchin
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-Mail: jmc3@nrc.gov
(*electronic copy only*)

Office of the Commission Appellate
Adjudication
Mail Stop: 16-G-15 OWFN
U. S. Nuclear Regulatory Commission
Washington, DC 20555
(*United States mail only*)



Denise Chancellor
Assistant Attorney General
State of Utah