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May 31, 2000

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board

In the Matter of)

PRIVATE FUEL STORAGE L.L.C.)

(Private Fuel Storage Facility))

Docket No. 72-22-ISFSI

APPLICANT'S BRIEF ON THE SCOPE OF
UTAH CONTENTION S, BASIS ONE

Pursuant to the Memorandum and Order of the Atomic Safety and Licensing Board ("Board") of May 1, 2000,¹ Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") files this brief on the scope of Utah Contention S ("Utah S"), Basis One. The Board should rule that the scope of Utah S excludes the issue of whether the letter of credit for estimated facility and site decommissioning costs should also include funds for decommissioning the spent fuel storage casks to be used at the Private Fuel Storage Facility ("PFSF"). That issue was not part of the contention as admitted and is therefore not properly within the scope of Utah S.

I. BACKGROUND

Utah S, admitted in April 1998, challenged the adequacy of PFS's decommissioning plan and decommissioning funding plan for the PFSF. The Board limited the scope of Utah S to Bases 1, 2, 4, 5, 10, and 11. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) LBP-98-7, 47 NRC 142, 196-97, 255 (1998).² On Janu-

¹ Memorandum and Order (Granting Joint Motion to Approve Stipulation on Contention Utah S and Outlining Administrative Matters) (May 1, 2000).

² Utah S, Basis 11 was subsequently dismissed after the dismissal of Utah Contention B. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) LBP-99-39, 50 NRC 232, 236 (1998).

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ary 26, 2000, the State filed a request to admit two late-filed bases for Utah S.³ One of the late bases alleged that PFS's funding plan was deficient because it provided for the prepayment of storage cask decommissioning costs on a cask-by-cask basis prior to the use of each cask at the PFSF, rather than the prepayment prior to the operation of the facility of decommissioning costs for all casks that would potentially be used at the PFSF over its lifetime.⁴ The Board denied the State's request as unjustifiably late. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-8, 51 NRC ___, slip op. at 25 (Mar. 21, 2000).

On April 7, 2000, PFS and the State filed a joint motion to approve a stipulation for the hearing of Utah S.⁵ It proposed, inter alia, the amendment of Utah S Basis 1 to allege that PFS's funding plan was deficient, in that PFS's decommissioning letter of credit which covered the cost of decommissioning the PFSF facility and site, did not cover the storage casks. Notwithstanding the agreed upon wording, the motion reserved to PFS the right to argue that the allegation was outside the scope of Basis 1 as admitted.⁶

Amended Basis 1 reads as follows:

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

³ State of Utah's Request for Admission of Late-Filed Bases for Utah Contention S (Jan. 26, 2000) [hereinafter "Utah S Req."].

⁴ Id. at 4; Declaration of Michael F. Sheehan, Ph.D. in Support of State of Utah's Request for Admission of Late-Filed Bases for Utah Contention S (Jan. 26, 2000) at ¶ 8.

⁵ Joint Motion by the State of Utah and the Applicant to Approve Stipulation for the Hearing of Utah Contention S (Apr. 7, 2000).

⁶ Id. at 2.

On May 1, 2000, the Board granted the motion and provided for the briefing of this issue.⁷

II. DISCUSSION

The scope of Basis 1 should exclude the issue of whether PFS's letter of credit, which will be used to cover site decommissioning costs for the PFSF site and facility, must also cover the cost of decommissioning the spent fuel storage casks that will be used at the PFSF. That issue was not part of the contention as originally admitted and the contention cannot be expanded to encompass it unless the State meets the standards for late-filed contentions, which it has not even tried to do. The State essentially seeks the admission of the same basic issue, i.e., that the PFS plan "to require payment of decommissioning costs [for storage casks] at the time a cask is accepted for storage rather than before the start of operations" violates NRC decommissioning regulations, that the Board rejected as unjustifiably late when the State sought the admission of late bases for Utah S last January. Private Fuel Storage, LBP-00-8, slip op. at 1, 25.

A. **Intervenors are Bound by the Literal Terms of Their Own Contentions**

It is well-established NRC case law that "an intervenor is bound by the literal terms of its own contention" and that "the reach of a contention necessarily hinges upon its terms coupled with its stated bases." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 & n.11 (1988).⁸ "Thus, an

⁷ Memorandum and Order at 3.

⁸ An intervenor is also bound by the literal terms of its contention as described and reworded by a licensing board in admitting the contention, if so described and/or reworded. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 284 (1987).

intervenor is not free to change the focus of its admitted contention, at will, as the litigation progresses.” Id. n.11.

B. The Literal Terms of Utah S Basis 1 as Originally Admitted Did Not Encompass the Timing of Cask Decommissioning Funding

Basis 1 of Utah S, as originally admitted by the Board in April 1998, reads as follows:

The Applicant has failed to provide reasonable assurance, as required by 10 CFR § 72.30(b), that funds will be available to decommission the ISFSI. The Applicant intends to obtain a letter of credit “in amount of \$1,631,000 to cover the estimated facility and site decommissioning costs, exclusive of the storage casks.” LA at 5-2. As a newly formed entity and without any documentation included in the application as to PFS’s capital structure or assets, the Applicant offers no reasonable assurance that it will be qualified to obtain such a letter of credit. Contention E (Financial Qualifications), which more fully discusses the financial assurance for newly formed entities, and whose basis is incorporated into this contention. [sic]

State of Utah’s Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility (Nov. 23, 1997) [hereinafter “State Cont.”] at 123. Thus, the assertion of Basis 1 was that PFS would be unable to obtain “such a letter of credit,” i.e., a letter of credit “in amount of \$1,631,000 to cover the estimated facility and site decommissioning costs, exclusive of the storage casks.” Nowhere did Basis 1 allege that the letter of credit must cover storage cask decommissioning and nowhere did Basis 1 (or the other admitted bases of Utah S for that matter) allege that it would be improper for PFS to prepay cask decommissioning costs on a cask-by-cask basis prior to the use of each cask at the PFSF. Indeed, Basis 1 as originally admitted specifically excluded decommissioning funding for storage casks.

Thus, the timing of PFS's funding of cask decommissioning is outside the scope of Basis 1.

C. The State Seeks to Raise an Issue that the Board Rejected as Late-Filed

As discussed above, it is clear from the text of the original Basis 1 that it did not encompass the issue of whether PFS's letter of credit must cover the cost of cask decommissioning. By attempting to expand the scope of Basis 1, the State, in fact, is attempting to gain the admission of an issue it sought to raise as an admittedly late-filed basis for Utah S in its request of January 26, 2000 and which the Board rejected as unjustifiably late. The late basis (Basis 12) asserted that, "The [NRC] Staff's proposed acceptance . . . of the Applicant's proposal to require payment of decommissioning costs at the time a cask is accepted for storage rather than before the start of operations is in violation of the requirements of 10 CFR § 72.30(c)(1)." Utah S Req. at 3. The State claimed that under the prepayment option for decommissioning funding, PFS must prepay cask decommissioning costs for all the casks to be used at the PFSF prior to facility operation, even though individual casks would not be used for many years after the commencement of operation. *Id.* at 4. The Board, however, rejected the State's basis as unjustifiably late:

Relative to the State's January 26, 2000 request for late-filed admission of contention Utah S issues twelve and thirteen concerning the funding submission timing for the estimated costs of decommissioning the individual storage casks that will be stored at the [PFSF], the Board concludes that . . . issue twelve must be dismissed [as unjustifiably late].

LBP-00-8, slip op. at 25 (emphasis added).

Here, the State seeks to raise again the same challenge to PFS's timing for funding of storage cask decommissioning costs. In both cases, the State's complaint is with

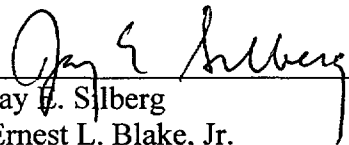
PFS's "funding submission timing for the estimated costs of decommissioning the individual storage casks."

Clearly, since the State raised this issue as an admittedly late basis for Utah S, the State itself did not believe that this issue was encompassed by Utah S as admitted by the Board in 1998. As discussed above, Basis 1 as admitted only challenged PFS's ability to obtain a letter of credit to cover site decommissioning costs "exclusive of the storage casks." The State should not be allowed to sneak in through the back door of contention reinterpretation an issue the Board rejected at the front door as unjustifiably late. Such is not permitted under the NRC case precedent cited above. Therefore, the Board should exclude from Utah S Basis 1 the issue of whether PFS's letter of credit must cover storage cask decommissioning costs.

III. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Board exclude from Utah S Basis 1 the issue of whether PFS's letter of credit must cover the cost to decommission PFS's spent fuel storage casks.

Respectfully submitted,



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Docket No. 72-22

ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Brief on the Scope of Utah Contention S, Basis One" was served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 31st day of May 2000.

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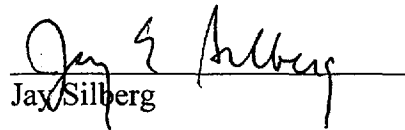
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