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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

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

) Docket No. 72-22-ISFSI

) ASLBP No. 97-732-02-ISFSI

) September 11, 2000

**STATE OF UTAH'S RESPONSE TO THE APPLICANT'S AND
THE STAFF'S DISCUSSION OF THE IMPACT OF CLI-00-13**

Pursuant to the Board's Order (Granting Motion for Leave to File Reply and Permitting Additional Filings on Impact of CLI-00-13), dated September 1, 2000, the State of Utah files this response to Private Fuel Storage, LLC's ("PFS's") and the Staff's discussion of CLI-00-13.¹ See the "Applicant's Reply to the Proposed Findings of Fact and Conclusions of Law of the State of Utah and the NRC Staff on Contentions Utah E/Confederated Tribes F, Utah R, and Utah S" (proprietary) (hereinafter "PFS Reply Findings") at 3-4, and "NRC Staff's Proposed Findings in Reply to the State of Utah's Proposed Findings concerning Contentions Utah S and Utah E/Confederated Tribes F" (proprietary) (hereinafter "Staff's Reply Findings") at 39-40, both dated August 28, 2000.

In its Reply Findings, the Staff takes the position that "with respect to many issues [relating to Contentions Utah E and S] ... the Applicant's commitment to include various provisions in its Service Agreements serves as a basis for resolving those issues." Staff's

¹ Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC __ (August 1, 2000).

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Reply Findings at 40. In this section of its Reply Findings, the Staff does not elaborate on the “various provisions” of the incipient agreement. PFS takes a similar position arguing that the effect of CLI-00-13 is to place before the Board the sufficiency of the service agreement to implement commitments made by PFS. PFS Findings at 3-4.

Both the Staff and PFS rely on the prospective terms and conditions of the service agreement as part of PFS’s demonstration that the Applicant has reasonable assurance of obtaining the necessary funds to construct, operate, maintain and decommission the ISFSI. To the extent that future contractual terms and conditions form part of PFS’s financial assurance demonstration, there must be a mechanism to ensure clarity and Staff enforceability of any financial assurance commitments PFS intends to implement through the service agreement. If PFS has to abide by its commitments as license conditions then there will be a certain concreteness in what PFS has actually committed to do. Also, when the essence of those commitments are written as black letter license conditions, the Staff can inspect against those enumerated conditions and, if necessary, enforce them.

The State disagrees with the Staff and PFS that placing the service agreement before the Board abrogates the need for specific license conditions. First, the Staff is unlikely to review all the various provisions of the service agreement that relate to PFS’s financial demonstration during its post license inspection of PFS. Moreover, such a review may call for post hearing complex legal determinations that the Commission found unacceptable. CLI-00-13 at 14. In addition, if commitments are not spelled out in specific license conditions, an NRC inspector will not know what items to review or whether the contract provisions resolve all financial assurance concerns.

Second, even if the Staff's inspections found that the service agreement was ineffectual to implement 10 CFR § 72.22(e), the Staff would not be able to enforce the contractual obligations under the service agreement because the Staff is not a party to the contract. For example, in responding to a 10 CFR § 2.206 petition, the NRC found that it has no authority over another entity whose actions may cause a violation of certain NRC environmental license conditions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), DD-85-18, 22 NRC 870, 871-872 (1985). Instead, the Acting Director found that in the absence of a present violation of any regulation or license condition, it is not appropriate for NRC to take enforcement action. Id. at 872. Thus, if the Staff were to find a violation of the PFS-customer service agreement, the Staff would be impotent to take enforcement action.

Third, the Staff's enforcement tools do not provide it with the means of enforcing the promises made by PFS during the adjudicatory proceeding or loosely contained in its correspondence to the Staff or in its license application. Under 10 CFR §§ 72.44(b)(2), 72.60 and 72.84, the Staff may revoke or suspend a license or impose civil penalties if a licensee fails to abide by the terms of its license, license conditions, or orders. The State's experience with the NRC's reluctance to move in the face of less than clearly defined enforcement authority, suggests that it is unlikely the Staff will take enforcement action against PFS unless there is a violation of a specific regulation, license condition or order. *Sæ* State of Utah's Response to the Applicant's Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes F (December 27, 1999), Attachment B thereto, Declaration of William J. Sinclair (December 27, 1999) at ¶ 6 ("The NRC maintained that it could not

increase the Atlas reclamation bond until it had approved an amended reclamation plan.”).

While it is essential that the service agreement form part of the administrative record, that agreement in and of itself is no substitute for license conditions. The issue before the Commission in CLI-00-13 was whether to extend Claiborne’s use of license conditions to support a finding of reasonable financial assurance under Part 72. CLI-00-13 at 6. The Commission affirmed the Board’s summary disposition decision insofar as the Commission approves use of license conditions as part of PFS’s demonstration of financial assurance under Part 72. Id. at 10. The Commission also articulated license conditions additional to the two license conditions proposed by the Staff that must be incorporated into PFS’s license. Id. at 16.

In its Reply Findings the Staff appears to argue that the only other license conditions required for Contentions Utah E and S are those articulated in the Commission’s decision. Staff’s Reply Findings at 40. The Staff’s position is without merit. The Commission could only articulate license conditions to the extent that it had a record before it. The issue of costs, on-site insurance, and decommissioning were not appealed to the Commission and thus, there was no record of those issues before the Commission. It is obvious that unless the Commission insisted that PFS’s commitments were turned into license conditions, the Staff would not do so.² The same is true of the promises that PFS has made in the adjudicatory hearings on Contentions Utah E and S.

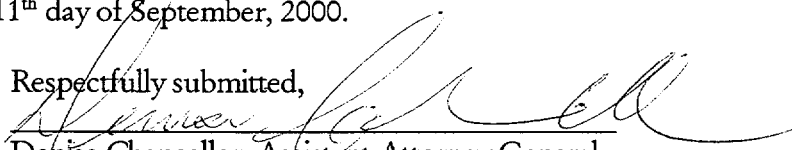
² In its Reply Findings the Staff states: “[A]lthough the Staff had previously stated its view that some commitments were not necessary to be license conditions, the Staff will now include those items set forth by the Commission as license conditions.” Staff’s Reply Findings at 40.

In its initial filing on the Impacts of CLI-00-13, the State articulated the reasons for including certain issues from the hearing as license conditions. If the Staff is reluctant to take this step, there is another option available to the Board. In Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB 898, 38 NRC 36 (1988) the Appeal Board was concerned that "at present there is a lack of full assurance that the applicant will adhere to what the Licensing Board (perhaps mistakenly) took to be a commitment that could be relied upon" in meeting a certain regulatory requirement. Turkey Point, 38 NRC at 40. Instead of remanding the issue back to the Licensing Board, the Appeal Board ordered that the licensee adhere to specific technical requirements. Id. at 41. As in the case of Turkey Point, this Licensing Board could take PFS's pledges before the Board and incorporate them into its own order.

In sum, if PFS and the Staff intend to rely on promises made by PFS to make a showing that PFS meets 10 CFR § 72.22(e), those promises must be turned into license conditions. In the alternative, the Board could order that PFS adhere to certain enumerated commitments if the Board is to find that PFS complies with 10 CFR § 72.22(e).

DATED this 11th day of September, 2000.

Respectfully submitted,



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

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S RESPONSE TO THE APPLICANT'S AND THE STAFF'S DISCUSSION OF THE IMPACT OF CLI-00-13 was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 11th day of September, 2000:

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)

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

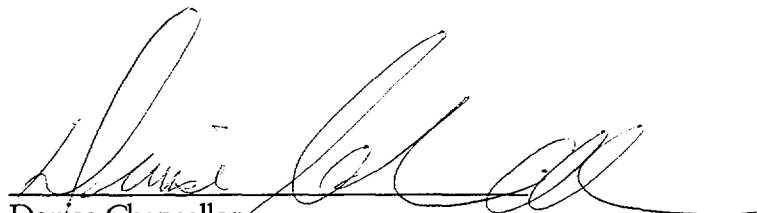
John Paul Kennedy, Sr., Esq.
1385 Yale Avenue
Salt Lake City, Utah 84105
E-Mail: john@kennedys.org

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

Office of the Commission Appellate
Adjudication
Mail Stop: O14-G-15
U. S. Nuclear Regulatory Commission
Washington, DC 20555

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*)



Denise Chancellor
Assistant Attorney General
State of Utah