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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 72-22-ISFSI

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

August 1, 2000

The Commission grants interlocutory appellate review, and affirms in part and reverses in part the Atomic Safety and Licensing Board's decision on financial qualifications. LBP-00-6, 51 NRC 101 (2000). The Commission approves the use of license conditions as an element of an applicant's showing of financial assurance for the construction and operation of a spent fuel storage facility, but requires the Applicant in this case to place in the record a sample service contract so that Intervenor will have a chance to contest the contract's effectiveness in assuring the Applicant's receipt of adequate funds.

INTERLOCUTORY COMMISSION REVIEW

The Commission's general policy is to minimize interlocutory appellate review. The Commission ordinarily grants such review only where the ruling below either threatens a party with "immediate and serious irreparable harm" or "affects the basic structure of the proceeding in a pervasive or unusual manner." 10 C.F.R. § 2.786(g).

INTERLOCUTORY COMMISSION REVIEW

Sometimes interlocutory review is appropriate as an exercise of the Commission's inherent and ongoing supervisory authority over adjudicatory proceedings, particularly where the ruling below raises novel questions that could benefit from early Commission resolution, and where, as the Commission has encouraged in a policy statement, a licensing board has referred a novel issue to the Commission. *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998).

FINANCIAL ASSURANCE: SPENT FUEL STORAGE FACILITIES

The financial requirements for an ISFSI license under Part 72, like the requirements for a fuel facility license under Part 70, are not the same as the financial requirements for reactor licenses under Part 50. Part 50 prescribes in detail precisely what a reactor license applicant must demonstrate, while Part 72 contains no equivalent detail. It simply sets out a broad "financial assurance" command.

FINANCIAL ASSURANCE: SPENT FUEL STORAGE FACILITIES

Outside the reactor context it is sufficient for a license applicant to identify adequate mechanisms to demonstrate reasonable financial assurance, such as license conditions and other commitments.

FINANCIAL ASSURANCE: SPENT FUEL STORAGE FACILITIES

License conditions prohibiting construction or operation of a spent fuel facility if the applicant cannot raise sufficient funds are an appropriate means of bolstering a financial plan, and narrowing the questions at issue in demonstrating financial assurance.

FINANCIAL ASSURANCE: SPENT FUEL STORAGE FACILITIES

A license applicant's additional commitments should be expressly incorporated into the license to eliminate any question about what the commitments are and about whether they are enforceable.

FINANCIAL ASSURANCE: LICENSE CONDITIONS

Using license conditions to establish financial qualifications, and depending on NRC Staff oversight to ensure that the license conditions are met, does not

improperly defer material licensing issues to the post-license inspection process so long as the NRC Staff inquiry is essentially ministerial and by its very nature requires post-hearing resolution.

FINANCIAL ASSURANCE: LICENSE CONDITIONS

License conditions requiring post-hearing verification should be precisely drawn so that NRC Staff inquiry becomes largely a ministerial rather than an adjudicatory act — that is, the Staff verification efforts should be able to verify compliance without having to make overly complex judgments on whether a particular act conforms, as a legal and factual matter, to the promises the applicant has made.

FINANCIAL ASSURANCE: LICENSE CONDITIONS

Evaluating whether promised contractual provisions in fact function as intended is not merely a ministerial act; it calls for legal judgment. In such cases, the applicant should place in the adjudicatory record a sample contract, and give intervenors a chance to contest its adequacy. A board-approved sample contract will serve as guidance to the NRC Staff in later determining whether the applicant has met its financial assurance license commitments.

MEMORANDUM AND ORDER

This case involves a license application to build and operate a temporary spent fuel storage facility in Utah. On March 10, 2000, the Licensing Board issued an order granting (in part) a motion for summary disposition filed by the license applicant, Private Fuel Storage, L.L.C. ("PFS"), on a financial assurance contention, the so-called "Utah E/Confederated Tribes F." *See* LBP-00-6, 51 NRC 101 (2000). The Board ruled, among other things, that PFS properly could rely on license conditions to demonstrate adequate financing for construction and operation of its planned facility. Pursuant to 10 C.F.R. § 2.730(f), the Board referred its financial assurance ruling to the Commission. We affirm in part and reverse in part, and remand the financial assurance issue to the Board for further proceedings. We also direct PFS and the NRC Staff to include in PFS's license several conditions that reflect financial assurance commitments PFS has made in the course of this proceeding.

I. BACKGROUND

PFS is seeking a license to construct and operate an independent spent fuel storage installation ("ISFSI") on land owned by the Goshute Indian Tribe in Tooele, Utah. PFS is a limited liability company formed by eight members, all of which are nuclear power generating utilities. An admitted contention, labeled Contention Utah E/Confederated Tribes F, alleges that PFS has failed to demonstrate that it is financially qualified to construct and operate the proposed ISFSI, as required under 10 C.F.R. §§ 72.22(e) and 72.40(a)(6). The contention was admitted as follows:

Utah E/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 in 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 [PFS facility (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-00-6, 51 NRC at 106-07.

On December 3, 1999, PFS filed a motion seeking summary disposition of Bases 1-5 and 7-10 — i.e., on all issues other than the adequacy of PFS's cost estimates for constructing and operating the proposed ISFSI.

On January 4, 2000, the NRC Staff issued its site-related Safety Evaluation Report ("SER"), in which it found PFS financially qualified to construct and operate the facility, providing two proposed conditions were included in its license. The proposed conditions are as follows:

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.

In addition to these license conditions, the Board found that PFS had agreed that it will require each customer to retain title to the spent fuel throughout the storage period; that it will include in each customer service agreement an assignment of legal and financial responsibility between the customers and PFS; that it will "not voluntarily terminate before it has provided all agreed upon spent fuel storage services as required in the service agreements, it has completed its licensing and regulatory obligations under its license, and the license is terminated"; that it will require customers periodically to submit evidence of creditworthiness and provide additional financial assurances, when necessary (such as prepayment, letters of

credit, or a third-party guarantee); and that it will obtain onsite property insurance in the amount of \$70 million and an offsite liability policy in the amount of \$200 million, which is the largest offsite insurance policy commercially available. *See* LBP-00-6, 51 NRC at 137. The Board also found that PFS had committed to making the Service Agreements effective for the entire life of the ISFSI facility. *See id.* at 118; *see also* Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F at 9.

PFS's motion for summary disposition argued that the license conditions and other promises mooted Utah's concerns in Bases 1-5 and 7-10. The Board agreed that the proposed conditions, additional commitments, and information submitted by PFS mooted all of Contention Utah E except for Basis 6 ("estimated costs of construction and operation"), Basis 10 with respect to the amount of onsite liability insurance, and Basis 5 insofar as it relates to onsite liability. Accordingly, the Board ruled that a hearing would still be held to resolve the estimated costs issue and the potential liability issue. *See* LBP-00-6, 51 NRC at 112-33. The Board referred its ruling for Commission review pursuant to 10 C.F.R. § 2.730(f). *See id.* at 136. The Board deemed a referral to the Commission "warranted" because prior Commission rulings on financial assurance, including one in this very proceeding, lie "[a]t the heart" of the Board's determination. *Id.* *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36 (1998); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997).

Both PFS and the NRC Staff urge the Commission, if it grants review, to affirm the Board's ruling.

II. INTERLOCUTORY COMMISSION REVIEW

In the interest of time, the Commission, through its office of the Secretary, ordered the parties to brief both the question whether plenary interlocutory review is appropriate and the merits of the financial assurance issue. We find review appropriate under 10 C.F.R. § 2.730(f), as the Board's referral of the financial assurance issue presents a novel issue that will benefit from early Commission review. Section 2.730(f) directs presiding officers to refer a ruling to the Commission if, in the judgment of the presiding officer, a "prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense."

The Commission's general policy is to minimize interlocutory review. *See, e.g., Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994). Ordinarily we grant interlocutory review only where the referred ruling either threatens the adversely affected party with "immediate and serious irreparable harm" or "affects the basic structure of

the proceeding in a pervasive or unusual manner.” See 10 C.F.R. § 2.786(g). Sometimes, however, interlocutory review is appropriate as an exercise of our inherent and ongoing supervisory authority over adjudicatory proceedings. See, e.g., *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271, 279 (1990) (Appeal Board may exercise discretion to take review of referred ruling where ruling involved question of law that had generic implications and had not been previously addressed on appeal). In our *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998), we encouraged licensing boards and presiding officers to refer to the Commission rulings that present novel questions that could benefit from early resolution.

The policy statement indicated our willingness to exercise our interlocutory review authority in situations such as the one now before us. In *Claiborne*, we approved use of license conditions to demonstrate financial assurance under Part 70 (governing materials licenses). The Board ruling here constitutes a decision of first impression because it extends the *Claiborne* “license conditions” approach to Part 72 ISFSI licenses, the first application of the approach outside the Part 70 context. Early Commission review of the Board decision not only will clarify what, if anything, requires further litigation in the current case, but also may have generic implications for other proceedings, as the question of when a license applicant has met its financial qualification requirements comes up frequently in a variety of contexts. Accordingly, we have decided to review the Board decision, and turn now to the merits of the questions it raises.

III. FINANCIAL ASSURANCE THROUGH LICENSE CONDITIONS

A. Use of License Conditions To Provide Financial Assurance Under Part 72

Whether a license condition may be used to support a finding of reasonable financial assurances under Part 72 of our regulations is a legal question, which we review *de novo*. See *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 206 (1997). We agree with the Board that license conditions can be an acceptable method for providing reasonable assurance of financial qualifications under 10 C.F.R. Part 72.

As we mentioned above, the Board’s view derives from early guidance we gave in this very case. See CLI-98-13, 48 NRC at 36-37. There, we encouraged the Board and the parties to consider the use of license conditions to satisfy certain Part 72 financial assurance requirements; much in the same way license conditions were used to eliminate certain concerns over the applicant’s financial assurance under Part 70 in *Claiborne*. In its appellate brief, the State of Utah presents two arguments why a license condition should not be used to satisfy

financial assurance requirements of Part 72. First, Utah says that the Board mistakenly “equated” the financial provisions of Part 72 with those of Part 70. Second, it claims that 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.” Neither argument is persuasive.

In support of its first argument, Utah attempts to distinguish between the financial requirements for an ISFSI license (Part 72) and the requirements for the fuel-facility materials license at issue in *Claiborne* (Part 70). In setting the financial qualifications standard that an applicant must meet, Part 70 uses the phrase “appears financially qualified,” rather than the phrase “possesses . . . or has reasonable assurance of obtaining [the necessary funds],” which is found in Part 72. See 10 C.F.R. § 72.22(e). In *Claiborne*, the Commission pointed to differences in language between Part 70’s “appears financially qualified” clause and Part 50’s language, which, like Part 72, uses “reasonable assurance” terminology. We concluded in *Claiborne* that the “appears financially qualified” standard is “more flexible” than the detailed Part 50 standard. See 46 NRC at 299-300. However, nowhere in *Claiborne* did we state or imply that a carefully drawn license condition could not, in combination with reasonable cost estimates, provide “reasonable assurance” — even outside the Part 70 context examined in *Claiborne* — that the applicant will have sufficient funds to construct and operate a licensed facility safely.

Utah is incorrect in its assertion that the Board failed to address the implication of the facial difference in the language of Part 70 and Part 72. The Board did address the language variance between the two parts, and found — we think correctly — that it alone did not answer the question whether license conditions can provide sufficient financial assurance under Part 72. See LBP-00-6, 51 NRC at 113-14. Utah maintains that the Board should have looked to the comprehensive reactor financial assurance requirements found in Part 50 as “guidance” for what is necessary for ISFSI financial assurance. But, while both Part 72 and Part 50 call for “financial assurance” showings, the two parts differ considerably on what must be shown. Part 50 prescribes in detail precisely what a reactor license applicant must demonstrate. See 10 C.F.R. § 50.33(f); 10 C.F.R. Part 50, Appendix C. Part 72, by contrast, contains no equivalent detail; it simply sets out a broad “financial assurance” command. See 10 C.F.R. § 72.22(e). Part 72, in other words, provides flexibility that Part 50 does not.

Thus, as we held in *Claiborne*, outside the reactor context it is sufficient for a license applicant to identify adequate mechanisms to demonstrate reasonable assurance, such as license conditions and other commitments. We will not require such applicants to meet the detailed Part 50 requirements.

Our flexible approach to financial assurance in nonreactor cases appropriately reflects differing levels of risk. Utah, though, argues that the Board erroneously found that an ISFSI presents safety risks more closely comparable to a uranium

enrichment plant, like the one at issue in *Claiborne*, than to a nuclear power reactor. According to Utah, the risks of an ISFSI are as great as those of a reactor, and therefore PFS should make the same type of detailed financial showing required of reactor license applicants under Part 50. We disagree with Utah and find the Board's risk calculus reasonable. As the Board pointed out, the Commission has previously stated that a spent fuel storage facility, which holds fuel that has been cooled for at least 1 year and is not subject to dispersive forces associated with high temperatures and pressure, has a much smaller potential for serious accidents than a power reactor. See LBP-00-6, 51 NRC at 114-16; see also 60 Fed. Reg. 20,879 (1995).¹

Claiborne should not be interpreted, however, to hold that where the danger to public health and the environment presented by a proposed facility is not as great as the danger presented by a nuclear reactor, the Commission will grant a license to an applicant of dubious financial qualifications. Under the *Claiborne* approach, we still consider the financial prospects of the proposed licensee, but we do not hold the license applicant to Part 50-style specific means of showing financial capability. *Claiborne*, for example, holds that the NRC need not require detailed guarantees for financial backing when it has other means at its disposal, such as license conditions, that make underfunding unlikely.

As we held in *Claiborne*, the requirement that a party provide reasonable financial assurance does not require an ironclad guarantee of future business success. See CLI-97-15, 46 NRC at 307. Even when evaluating financial assurance under Part 50,

The Commission will accept financial assurances based on plausible assumptions and forecasts, even though the possibility is not insignificant that things will turn out less favorably than expected. Thus, the mere casting of doubt on some aspects of proposed funding plans is not by itself sufficient to defeat a finding of reasonable assurance.

North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 222 (1999). Thus, where a license applicant depends upon contractual and other commitments for financial assurance, we do not reject the showing out of hand or require litigation on the feasibility of those aspects of the applicant's financial plan or economic prospects. Here, the PFS license conditions are such that the facility will not be built or operated if PFS cannot raise sufficient funds.

¹ In the statement of considerations supporting a 1995 rulemaking that revised Part 72, the Commission responded to a comment that the standards should be the same for ISFSI licensing as for a nuclear power license:

The potential ability of irradiated fuel to adversely affect the public health and safety and the environment is largely determined by the presence of a driving force behind dispersion. Therefore, it is the absence of such a driving force, due to the absence of high temperature and pressure conditions in an ISFSI (unlike a nuclear reactor operating under such conditions that could provide a driving force), that substantially eliminate the likelihood of accidents involving a major release of radioactivity from spent fuel stored in an ISFSI.

60 Fed. Reg. 20,883 (1995).

Further, the cost assumptions, which are a critical part of the funding plan, are subject to litigation before the Board. *See* LBP-00-6, 51 NRC at 123 n.9. Under *Claiborne*, such conditions are an appropriate means of bolstering a financial plan, and narrowing the questions at issue in demonstrating financial assurance. We therefore affirm the Board's decision in LBP-00-6 insofar as it approves use of license conditions as part of PFS's showing of financial assurance to operate an ISFSI facility under Part 72.

B. Additional License Conditions

In addition to the two proposed license conditions, the Board also relied on other commitments offered by PFS during the licensing process. *See* LBP-00-6, 51 NRC at 137-38.² Utah argues that these additional commitments amount to bald promises that offer no assurance of being fulfilled. While we disagree with Utah's suggestion that an applicant has no enforceable obligation to stand behind representations made during the licensing process, we hold here, as we have in other similar cases, that the additional conditions should be expressly incorporated into the PFS license in order to eliminate any ambiguity as to what PFS's commitments are and to eliminate any question about whether these promises are fully enforceable. *See, e.g., Claiborne*, 46 NRC at 308-09.

In addition, because PFS has stated that it will make the term of the service agreements cover the entire term of the license (*see* Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F, at 9), proposed license condition LC 17-2 should be revised to read as follows: "PFS shall not proceed with the Facility's operation unless it has in place Service Agreements covering the entire term of the license, with prices sufficient to cover the operating, maintenance, and decommissioning costs of the Facility for the entire term of the license."

²The additional commitments are to:

1. Incorporate into its customer service agreements (member and nonmember) provisions that mandate:
 - a. PFS will not voluntarily terminate before it has provided all agreed upon spent fuel storage services as required in the service agreements, it has completed its licensing and regulatory obligations under its license, and the license is terminated;
 - b. An assignment of legal and financial responsibility between the customer, as the owner of the spent fuel, and PFS, including an acknowledgment that each customer must retain title to its fuel throughout the storage period;
 - c. Customers will be required to (i) periodically provide pertinent financial information; (ii) meet creditworthiness requirements; and (iii) provide PFS with any necessary additional financial assurances (e.g., an advance payment, irrevocable letters of credit, third-party guarantee, or payment and performance bond); and
2. Obtain an offsite liability policy in the amount of \$200 million, i.e., a policy that matches the largest commercially available offsite insurance coverage available.

51 NRC at 137.

C. Right to a Hearing

Utah argues that the Board's decision violates its right to a hearing by "relegating financial qualification determinations to an inspection process in which the State has no role." Utah complains that under PFS's "license conditions" approach to financial assurance, an NRC inspector, after licensing, will have to resolve complex financial issues to determine whether PFS has in fact complied with the conditions, without input from Utah or from any other Intervenor. This, says Utah, improperly truncates its hearing right.

We find Utah's general argument overbroad. Using license conditions to establish financial qualifications, and depending on NRC Staff oversight to ensure that the license conditions are met, does not improperly defer material licensing issues to the post-license inspection process.³ If the determination necessary for licensing were whether PFS actually has in hand sufficient funds for construction and operations, then issuing the license on the strength of license conditions would be improper. But the material issue here is whether PFS has shown, to a reasonable degree, that it *will* have sufficient funds prior to construction and operation, not whether it already has the funds. This is an issue that can be resolved through appropriate license conditions, as we held in *Claiborne*, with compliance to be determined by the NRC Staff after licensing.

Longstanding agency practice holds that matters may be left to the NRC Staff for post-hearing resolution "where hearings would not be helpful and the Board can 'make the findings requisite to issuance of the license.'" *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1159 (1984), quoting *Consolidated Edison Co. of New York* (Indian Point Station, Unit 2), CLI-74-23, 7 AEC 947, 951 (1974). Post-licensing resolution is appropriate for matters where a hearing would be unlikely to affect the result. See *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-39, 15 NRC 1163, 1216 (1982) (relying on *Indian Point Station*). The key to the validity of post-licensing Staff reviews is whether the NRC Staff inquiry is essentially "ministerial" and "by [its] very nature require[s] post-licensing verification." See *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 NRC 227, 240 (2000).

³Utah cites *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), to support its view that post-licensing verification of compliance with financial license conditions unlawfully excludes material issues from the licensing hearing. But *Union of Concerned Scientists* is readily distinguishable from our case. There, the court of appeals struck down an agency rule excluding the results of emergency preparedness tests from NRC hearings, test results that the NRC's own rules made material to licensing. Here, by contrast, no NRC rule makes NRC Staff review of compliance with financial license conditions material to licensing. The important question in a case like ours, as *Union of Concerned Scientists* suggests, is whether the NRC Staff inspectors are expected to engage in "ministerial"-type compliance checks not suitable for hearings or are expected to themselves exercise a form of adjudicatory discretion. See 735 F.2d at 1449. As we explain below, here we lack sufficient information to answer that question, and therefore direct the Board to further consider it after obtaining additional information.

Here, we cannot definitively answer that question, for as Utah rightly points out, all we have are abstract promises by PFS that it will obtain contracts and other financial commitments guaranteeing the necessary funds. The PFS commitment leaves the nature of the NRC Staff's post-licensing inquiry uncertain. As Utah stresses, PFS has produced no draft of the proposed long-term service agreements on which the Board based its finding of reasonable financial assurance. In these circumstances, we cannot be sure, within acceptable bounds, what the agreements' terms will be, how inviolate their provisions will be, and how easy it will be for NRC verification reviews to determine compliance. This is not to say that the Staff is allowed no room to exercise professional judgment in conducting post-licensing verification activities. However, sufficient details should be provided in the license so that the Staff's review is not subject to meaningful debate.

Among other things, Utah points to the possibility that PFS will draw up service agreements with "loopholes" — e.g., agreements that would allow its members and customers to avoid paying for their spent fuel storage costs, leaving the facility underfunded, or agreements that would allow PFS itself to voluntarily dissolve, leaving the facility, still containing spent fuel, without an owner and operator. Although the Board found that the service contracts could reasonably ensure that these things will not happen, Utah contends that verifying that the relevant provisions are in the service contracts may require legal and factual judgments going beyond "ministerial" testing and inspection. On this point we agree with Utah.

To reconcile post-hearing verification of a license condition by the NRC Staff with cases like *Union of Concerned Scientists*, *Shoreham*, and *Indian Point Station*, we must insist that the condition be precisely drawn so that the verification of compliance becomes a largely ministerial rather than an adjudicatory act — that is, the Staff verification efforts should be able to verify compliance without having to make overly complex judgments on whether a particular contract provision conforms, as a legal and factual matter, to the promises PFS has made. The Board's finding of reasonable financial assurance rested largely on PFS's promises not to commence operations prior to obtaining service contracts that included certain provisions designed to ensure that PFS's customers and members could not easily avoid payments while leaving their spent fuel on PFS's hands. Because the Board's finding turned on the inclusion of certain provisions in the contracts, the wording of the contracts is crucial. But no sample or model service agreements appear in the record, and we are in no position to determine whether the NRC Staff verification role will be relatively straightforward — a simple determination whether promised provisions appear in the contracts — or will require difficult discretionary judgments.

In short, evaluating whether contract provisions in fact function as intended is not merely a ministerial act; it calls for legal judgment.⁴ We think the Board went too far in putting evaluation of the legal effectiveness of service agreements into the hands of the NRC Staff without itself reviewing a sample service contract.⁵ We have no doubt that a Board-approved and carefully worded model service contract would suffice as guidance to the NRC Staff in later determining whether PFS has met its financial assurance license commitments. This does not mean that PFS must slavishly incorporate into every contract the exact wording of the sample contracts. Rather, the sample contract is meant to provide guidelines that readily allow the Staff to determine during its verification review that the contents of actual contracts negotiated by PFS meet the Commission's expectations as reflected in the license.⁶

Accordingly, we reverse, in part, the Board's grant of summary disposition and remand the financial assurance issue with the direction that the Board (1) require PFS to produce a sample service contract that meets all financial assurance license conditions, and (2) give Intervenors an opportunity to address the adequacy of the service contract to meet the concerns raised in Contention E. If Intervenors do not raise further objections after reviewing the sample contract, or if the Board finds intervenors' objections insubstantial, then PFS would be entitled to summary disposition on Utah Contention E. Otherwise, the contention should be set for hearing.

The Board thus far has managed the scheduling of this case in exemplary fashion, and we thus leave to the Board's sound discretion the scheduling of further filings on the remanded financial assurance issue. We anticipate that the additional proceedings necessitated by this remand will not delay ultimate resolution of this licensing case or unduly interfere with the Board's current hearing schedule.

⁴ Among the provisions that must be in the service agreements are provisions that PFS will not voluntarily dissolve prior to providing the agreed services, a provision that the customer retains title to the spent fuel and an allocation of liability among customers and PFS for any liability associated with the fuel, and provisions requiring the customer to submit to credit checks and provide additional financial assurances.

⁵ In its December 15, 1999 statement of position regarding Utah Contention E, Basis 3, the NRC Staff agreed that without a draft or sample service agreement to look at, it was not possible to reach a finding that entering such contracts would provide reasonable financial assurances. See LBP-00-6, 51 NRC at 123 n.8. The Staff further noted that this issue will be resolved upon PFS's compliance with the Staff's proposed license conditions. *Id.*

⁶ This is analogous to the Commission's post-licensing reviews of financial assurance documents for materials licensees. For those reviews, Regulatory Guide 3.66, Standard Format and Content of Financial Assurance Mechanisms Required for Decommissioning Under 10 CFR Parts 30, 40, 70, and 72, provides sample contract language for financial assurance documents. While few bonds or letters of credit from banks use the exact language of the Regulatory Guide, it serves as adequate guidance to the Staff to ensure that the contractual documents provide the financial assurance intended by the Commission. Here, the sample contract, approved through the hearing process, will provide similar guidance for Staff use.

IV. CONCLUSION

For the foregoing reasons, the Licensing Board's ruling on financial qualifications in LBP-00-6 is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. In addition, we direct the NRC Staff and PFS to include in PFS's license, as license conditions, promises made by PFS during the licensing process and in support of its motion for summary judgment, including its commitments:

- not to commence construction before funding, in the amount to be determined at hearing, is adequately committed;
- not to commence operations before service agreements for the life of the license, with prices adequate to fund operations, maintenance, and decommissioning, in the amount to be determined at hearing, are in place;
- to include provisions in service agreements requiring customers to retain title to the spent fuel stored and allocating liability among PFS and the customers;
- to include provisions in the Service Agreements requiring customers to provide periodically credit information, and, where necessary, additional financial assurances such as guarantees, prepayment, or payment bond;
- to include in the customer service agreements a provision requiring PFS not to terminate its license prior to furnishing the spent fuel storage services covered by the service agreement;
- to obtain insurance for offsite liability in the amount of \$200 million (the maximum amount commercially available); and,
- to obtain insurance covering onsite liability in an amount to be determined at hearing.

IT IS SO ORDERED.

For the Commission⁷

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of August 2000.

⁷ Chairman Meserve and Commissioner Diaz were not available for affirmation to this Memorandum and Order. Had they been present, they would have affirmed the Memorandum and Order.

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From: Chazell, Russell
To: Freeman, Stanley
Subject: ADAMS Upload
Date: Wednesday, April 03, 2013 10:08:00 AM
Attachments: New England Coalition on Nuclear Pollution v. NRC, 582 F2d 87, (1st Cir. 1978).docx,
582 F2d 87.docx

Hi Stan,

Please upload the attached document to ADAMS. It will be going into the FQ SECY paper references package we discussed yesterday. (665P to follow).

Thanks,

Russ

Russell E. Chazell
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