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February 4, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Private Fuel Storage Facility)	)	

APPLICANT'S RESPONSE TO STATE OF UTAH'S REQUEST FOR ADMISSION OF LATE-FILED BASES FOR UTAH CONTENTION E

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby responds to the "State of Utah's Request for Admission of Late-Filed Bases for Utah Contention E," filed January 26, 2000. ("State Req."). The State's Request should be denied, first, for failing to meet the Commission's contentions requirements and second, for failing to meet the requirements for late-filed contentions. 10 C.F.R. § 2.714.

I. BACKGROUND

Utah Contention E ("Utah E"), admitted in April 1998, challenges PFS's financial qualifications to build and operate the Private Fuel Storage Facility ("PFSF"). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) LBP-98-7, 47 NRC 142, 251-52 (1998). On December 3, 1999, PFS filed a motion for summary disposition of all the bases of Utah E except that concerning PFS's estimate of the costs of building, operating, and maintaining the facility.[1] PFS's motion was based on its commitments not to build the facility without sufficient committed funding to cover the costs of construction and not to operate the facility without customer Service Agreements sufficient to

[1] Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (December 3, 1999) [hereinafter "PFS Utah E Mot."].

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cover the costs of operation and maintenance for the entire life of the facility (including the amortization of any debt used to fund facility construction). PFS Utah E Mot. at 3-10. On December 22, the NRC Staff filed a response supporting PFS's motion.[2] On December 27, the State filed a response opposing PFS's motion.[3]

In early January 2000, the NRC Staff reissued its Safety Evaluation Report ("SER") for the PFSF with the correct Chapter 17 that, inter alia, found PFS financially qualified, given PFS's commitments, and which contained proposed license conditions that would bind PFS to its commitments.[4] On January 10, 2000, the State filed a reply to the Staff's response to PFS's Utah E motion.[5] On January 26, 2000, the State filed its request to admit three late-filed bases for Utah E, which challenge PFS's use of financial commitments to demonstrate its financial qualifications to build and operate the PFSF.[6]

II. DISCUSSION

The State's request for admission of late-filed bases for Utah E should be denied because it does not satisfy the Commission's requirements for the admission of timely contentions, 10 C.F.R. § 2.714(b)(2), and because it does not satisfy the requirements for the late-filing of contentions, 10 C.F.R. § 2.714(a)(1).

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[2] NRC Staff's Response to Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (December 22, 1999) [hereinafter Staff Resp.].

[3] State of Utah's Response to the Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (December 27, 1999) [hereinafter State Resp.].

[4] Safety Evaluation Report of the Site-Related Aspects of the Private Fuel Storage Facility Independent Spent Fuel Storage Installation (January 7, 2000), Chapter 17. The SER was reissued on January 4 because of a collation error that resulted in the mistaken release, on December 15, 1999, of a draft of Chapter 17 with the SER. The reissued SER, with a final version of Chapter 17, replaced the first version SER in its entirety. See Applicant's Support of NRC Staff's Motion to Strike Portions of State of Utah's Reply to Staff Response to Applicant's Motion for Summary Disposition of Contention Utah E (January 28, 2000).

[5] State of Utah's Reply to the Staff's Response to the Applicant's Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes Contention F (January 10, 2000) [hereinafter State Repl.].

[6] These bases are quoted in full in Attachment A.

A. Failure to Meet Requirements for Admitting Timely Contentions

The State's three late -- filed bases are inadmissible because they impermissibly challenge the Commission's financial qualification regulations as interpreted and applied by the Commission. They are founded on the State's claim that the NRC's regulations do not allow an applicant to establish its financial qualifications by commitments, such as those made by PFS here and incorporated into the Staff's proposed license conditions. However, the Commission in Louisiana Enrichment Services (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997) [hereinafter LES], has clearly interpreted and applied its financial qualification rules to the contrary. Thus, the State seeks to challenge the regulations as interpreted by the Commission – and to impose an interpretation of the State's design on the Applicant and the NRC. Such is clearly impermissible under a long line of NRC case precedent. LBP-98-7, 47 NRC at 179.[7] Thus, the late bases present no genuine dispute with the Applicant on a material issue of law or fact and hence the State's request should be denied.

1. Challenge to PFS Commitments and Staff Proposed License Conditions Is an Impermissible Attack on Commission Regulations

Basis 11 asserts that the Staff's proposed license conditions and PFS's financial commitments do not satisfy 10 C.F.R. §§ 72.22(e) and 72.40(a)(6) because they do not ensure that PFS will be financially qualified at the time of the hearing and, if the NRC determines PFS's financial qualifications after the hearing, the State will be deprived of its right to a hearing under section 189(a)(1) of the Atomic Energy Act. State Req. at 4,

[7] Citing Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, aff'd in part on other grounds, CLI-74-32, 8 AEC 217 (1974); Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974); Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982).

6-7. The State's assertions are wrong and constitute an impermissible challenge to NRC regulations as interpreted and applied by the Commission.

a) Use of Commitments and License Conditions to Demonstrate Financial Qualifications Under NRC Rules

Part 72 financial qualifications require an applicant to show that it "possesses the necessary funds, or that applicant has reasonable assurance of obtaining the . . . necessary funds available to cover . . . [e]stimated construction costs [and] [e]stimated operating costs over the planned life of the ISFSI . . . ." 10 C.F.R. § 72.22(e) (emphasis added). Under the Commission's interpretations of its regulations as set forth in LES, PFS's commitments and the Staff's license conditions ensure that PFS will have reasonable assurance of obtaining the necessary funds to cover facility construction and operating costs, in that if PFS does not have sufficient committed funding before construction there will be no facility and if PFS does not have sufficient customer Service Agreements before operation the facility will not operate. The State's Basis 11 seeks to impose requirements different than those which the Commission has found acceptable under its regulations and therefore impermissibly challenges the NRC regulations.

In LES, the Commission found that the financial strategy of an applicant for a Part 70 materials license for a uranium enrichment facility, which was based on commitments very similar to those of PFS here, "provide[d] reasonable assurance that financial difficulties, should they arise, will not lead to safety problems." CLI-97-15, 46 NRC at 307 (emphasis added). The Commission determined such despite the fact that, at the time of licensing, LES itself (like PFS) did not have the finances to build or operate the facility. Id. at 304. At the heart of the Commission's finding were two facts. First, "[u]nder

[the applicant's] financing plan construction will not even begin until the necessary funding is fully committed." Id. at 307. "In view of [the applicant's] reasonable construction cost estimate and its advance funding commitment, we see little or no risk that lack of financing might lead to construction of an unsafe plant." Id. Second, "operations will not begin until firm supply contracts with . . . customers are in place." Id. "If [the applicant] never begins operation, there is no risk whatever to public health and safety." Id. Thus, the Commission found that a commitment approach, very similar to the one used by PFS here, provided reasonable assurance that the applicant would have available funds sufficient to cover facility construction and operating costs. Hence, the applicant was financially qualified.

The State argues in Basis 11 that the commitment approach that the Commission accepted in LES cannot apply to PFS because LES was decided under Part 70 rather than Part 72. State Req. at 6. The State's argument is baseless. As set forth above, PFS and LES are analogously situated with respect to the demonstration of financial qualifications through very similar financial commitments. And the approach approved by the Commission in LES (commitments "provide[ ] reasonable assurance") fits within the literal language of Part 72.[8] Any doubt on this question is erased by the Commission's confirmation in this case that the commitment approach would apply to PFS:

> In [LES] the Commission imposed license conditions that bound the applicant to financial commitments that it had made during the licensing proceeding. [LES, CLI-97-15, 46 NRC at 308-09] The conditions had the effect of assuring financial qualifications and obviating further litigation of these issues. The parties and the Board may wish to consider the feasi-

[8] CLI-97-15, 46 NRC at 307. The State's claim that the commitment and license condition approach is inadequate for a "limited liability company without any independent assets," State Req. at 7, simply ignores the Commission's determination in LES, in that the applicant there was just such an entity. CLI-97-15, 46 NRC at 304.

bility of license conditions in this proceeding, and the possibility that appropriate conditions might avoid difficult litigation over financial issues.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) CLI-98-13, 48 NRC 26, 36 (1998).[9]

The State also asserts that the LES commitment approach is inapplicable to PFS because the facility in LES and the "health and safety factors" are different than those for the PFSF. State Req. at 6. That claim is also baseless. The only authority cited by the State for its assertion is its response to PFS's motion for summary disposition of Utah E. See id. The cited State's response, however, first makes only a claim about the toxicity of depleted uranium tailings from processing UF_6 compared to the toxicity of high-level nuclear waste. State Resp. at 7. Such an assertion cannot provide the basis for an admissible contention, in that the State does not show that it is material, i.e., it does not show why such a fact (presuming it is true) makes the LES commitment approach to demonstrating financial assurance unsuitable for ISFSIs under Part 72. LBP-98-7, 47 NRC at 179-180.[10] The State's response does not provide any factual basis for claiming in any way that the PFSF is more dangerous than the LES facility would have been[11] and hence does not show in any way that the level of financial assurance provided by the LES commitment approach would be inadequate for the PFSF. The cited State's response

[9] The State has attempted to brush off the Commission's statement as an "off hand comment." State Resp. at 3; see also State Req. at 6. The State plainly mischaracterizes the Commission's deliberate provision of guidance to the parties and the Board in this proceeding. Further, the Commission also advised the Board and the parties that "[t]o the maximum extent practicable, both the NRC Staff in its safety and environmental reviews, and the Board, in its adjudicatory role, should avoid second-guessing private business judgments." 48 NRC at 36-37. Yet that is exactly where the State wishes to lead the Board and the parties in its desire to litigate a host of market-related issues.

[10] See Florida Power and Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 (1990); 10 C.F.R. § 2.714(b)(2)(iii).

[11] The State's response does not discuss in any respect the design or operation of the LES facility as a whole, State Resp. at 7-8, so any asserted comparison of its safety with the safety of the PFSF is sheer speculation and cannot form the basis for an admissible contention. LBP-98-7, 47 NRC at 180-81.

next makes an asserted comparison of the risks of the PFSF to those of a nuclear power plant, State Resp. at 7-8, that flies in the face of the Commission's determination regarding the relative risks of ISFSIs and reactors. See Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Nuclear Storage Installation, Final Rule, 45 Fed. Reg. 74,693, 74,694 (1980) (spent fuel storage is "low risk" compared to reactor operation). Such clearly cannot form the basis for a contention in that it is a direct attack on a generic determination made by the Commission. LBP-98-7, 47 NRC at 179.

In short, the State's arguments against PFS's use of commitments to demonstrate financial qualifications constitutes an impermissible attack on Commission regulations and determinations. Thus, they cannot form the basis for an admissible contention.

b) Financially Qualified at the Time of the Hearing

The State's late-filed Basis 11 also asserts that PFS cannot use the commitment approach to demonstrating its financial qualifications because such will not assure that PFS will be financially qualified "at the time the license is issued," in that PFS will not possess the necessary funds and will not "[have] reasonable assurance of obtaining the necessary funds to cover estimated construction costs, estimated operating costs over the planned life of the ISFSI, and estimated decommissioning costs." State Req. at 4. The State argues that reliance on funding commitments precludes an "up front determination of financial qualifications as required by Part 72." Id. at 7.

Basis 11 must be rejected as not raising a material dispute with PFS in that it is based on erroneous interpretations of NRC regulations and constitutes an impermissible attack on the regulations. At the outset, the State's basis must be rejected because of the ruling in the LES case. The Commission determined in LES at the time of the hearing,

on the basis of the applicant's financial commitments, that the applicant " 'appears to be financially qualified' to construct and operate the [facility]." CLI-97-15, 46 NRC at 306[12] (emphasis added). The determination was in the present tense—the Commission did not find that the applicant "will be financially qualified at some future date." Thus, PFS's very similar financial commitments show that, at the time of the hearing, PFS is financially qualified to build and operate the PFSF.

More specifically, Part 72 requires an applicant to show "that it has reasonable assurance of obtaining the . . . necessary funds," 10 C.F.R. § 72.22(e), and PFS's commitments provide such assurance. The Commission found in LES that

> "[the applicant's] financial strategy [i.e., commitments] provides reasonable assurance that financial difficulties . . . will not lead to safety problems. Under [the applicant's] financing plan, construction will not even begin until the necessary funding is fully committed. It is reasonable to assume that the advance funding commitments will cover costs of construction . . . .

CLI-97-15, 46 NRC at 307 (emphasis added). The Commission similarly found that the applicant's financial commitments would provide reasonable assurance that the applicant would have sufficient funds to cover operating and maintenance costs. See id.[13] Therefore, in accordance with the requirements of Part 72, PFS's financial commitments show that PFS is financially qualified, in that PFS has reasonable assurance of obtaining the necessary funds. Again any doubt as to the validity of applying the LES commitment ap-

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[12] Despite the difference in language between the Part 70 "appears to be financially qualified" and the Part 72 "is financially qualified," as shown in the preceding section, the financial commitments made by PFS demonstrate that it is financially qualified, in that the commitment approach used in LES fits within the literal language of the requirements of Part 72 and the Commission stated in this case that similar financial commitments would be appropriate.

[13] While the LES applicant committed to obtaining contracts to cover five years of operating and maintenance costs, LES, CLI-97-15, 46 NRC at 307, PFS commits to obtaining customer Service Agreements to cover operating and maintenance costs for the entire life of the PFSF. PFS Utah E Mot. at 8.

proach to this Part 72 proceeding has been laid to rest by the Commission itself in the above quoted guidance provided to the Board and the parties.

In short, the State's argument that PFS's commitment approach precludes "an up front determination . . . as required by Part 72," State Request at 7, is wrong. That argument is only the State's view of what NRC regulations and policy ought to be, which cannot form the basis for an admissible contention.[14] LBP-98-7, 47 NRC at 179 (citing Peach Bottom, supra note 6, ALAB-216, 8 AEC at 20-21 & n.33). Hence, Basis 11 presents no genuine dispute with PFS and it must be dismissed. 10 C.F.R. § 2.714(b)(2)(iii).

c) The NRC's Determination that PFS Is Financially Qualified Because of PFS's Commitments Will Not Deprive the State of Its Right to a Hearing

The State implies in Basis 11 that PFS's commitment approach to demonstrating its financial qualifications "violates Intervenor State of Utah's . . . rights to a prior hearing on all financial issues material to the licensing decision, and is contrary to Section 189(a)(1) of the Atomic Energy Act," in that it "postpone[s] the financial qualification analyses and determination to post-hearing resolution." State Req. at 4.

First, these arguments must be dismissed as direct attacks on the Commission's interpretation of its regulations. LBP-98-7, 47 NRC at 179. The State's assertion that the approach to determining financial qualifications which the Commission used in LES (and which it stated could be used in this case, CLI-98-13, 48 NRC at 36) is an unlawful post-hearing resolution depriving the State of its right to a hearing on financial qualifications

[14] The State's arguments about other NRC licensees that have allegedly encountered safety problems because of financial difficulties, see State Resp. at 10-11, are immaterial, in that they go to what the State believes NRC regulatory policy ought to be, not the what the requirements of 10 C.F.R. Part 72 are. The State's argument about DOE's default on its statutory obligations to take fuel, State Resp. at 9, is likewise immaterial and is also a challenge to the NRC's waste confidence rule. 10 C.F.R. § 51.23.

issues under the Atomic Energy Act is wrong. PFS is asking no more than that the Board follow the procedure followed by the Commission in LES. There, the Commission made a final determination at the hearing that the applicant's commitments, to which it was bound by license conditions, served to provide reasonable assurance that the applicant would obtain the funds necessary to build and operate its facility and that hence the Commission's financial qualification requirements were satisfied. CLI-97-15, 46 NRC at 303 & n.7, 309. Therefore, determining PFS's financial qualifications on the basis of its commitments and binding license conditions is not a post-hearing determination and Basis 11 must be dismissed as an attack on the Commission's LES ruling.[15]

Second, the State's arguments with respect to the Atomic Energy Act ("AEA") must be dismissed because they are plainly wrong as a matter of law and hence do not amount to a genuine dispute. Public participation in NRC licensing hearings under section 189(a) of the AEA is limited to "issues that the NRC considers material to licensing."[16] The NRC has " 'great discretion to decide what matters are relevant to its licensing decision.' " Id. at 330. "Section 189(a) 'does not confer the automatic right of intervention upon anyone.' "[17] It is for the NRC, not the intervenors, to "decide what is important enough to merit examination [in the hearing process]."[18]

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[15] The Appeal Board case cited by the State in support of its argument, Public Service of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313 (1978), cited in State Resp. at 16-17, is inapposite. First, the Commission's opinion in LES is controlling precedent here, as a subsequent decision by a higher tribunal. Second, Marble Hill was a Part 50 case rather than a Part 72 case, where financial qualifications requirements are not as stringent. Third, the Appeal Board in Marble Hill did not hold that Licensing Board review of the applicant's loan guarantee and ownership participation agreement were required but rather that they were "within the [Licensing] Board's discretion." ALAB-461, 7 NRC at 318.

[16] Massachusetts v. NRC, 924 F.2d 311, 331 (D.C. Cir. 1991) (emphasis added).

[17] Union of Concerned Scientists v. NRC, 920 F.2d 50, 55 (D.C. Cir. 1990) [hereinafter UCS II] (quoting BPI v. AEC, 502 F.2d 424, 428 (D.C. Cir. 1974)).

[18] Bellotti v. NRC, 725 F.2d 1380, 1381 (D.C. Cir. 1983). The State misreads Union of Concerned Scien-

Here, the material issues are set forth in the regulations and the Commission's decision in LES. Part 72 specifies that an ISFSI license applicant must be "financially qualified . . . in accordance with the regulations in this part." 10 C.F.R. § 72.40(a)(6) (emphasis added). To demonstrate that it is so qualified, it must "show that . . . [it] has reasonable assurance of obtaining the necessary funds . . . to cover . . . [e]stimated construction . . . operating . . . and decommissioning costs." 10 C.F.R § 72.22(e) (emphasis added). The Commission decided in LES that the applicant's financial commitments -- very similar to those made by PFS -- and license conditions that would bind the applicant to them provided reasonable assurance that the applicant would obtain the necessary funds and hence that the Commission's financial qualifications requirements were satisfied. CLI-97-15, 46 NRC at 307-09.

Therefore, the material issue regarding financial qualifications in this case is whether PFS is financially qualified, which turns on whether PFS has demonstrated reasonable assurance of obtaining the funds necessary to build and operate the PFSF. Thus, an NRC decision finding PFS financially qualified on the basis of PFS's financial commitments and binding license conditions would not deny the State its right to a hearing.

The State's arguments in its response to PFS's Utah E motion and in the State's reply to the NRC Staff that it must be allowed to litigate the financial means by which PFS will comply with the proposed license conditions prior to construction and operation of the PFSF, State Resp. at 15; State Rep. at 6-11, have no merit. At the outset, the scope

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tists v. NRC, 735 F.2d 1437, 1446 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985) [hereinafter USCI], cited in State Resp. at 16 n.15. As the D.C. Circuit has subsequently indicated, that case "ands for the proposition that Section 189(a) [of the AEA] prohibits the NRC from preventing all parties from ever raising in a hearing on a licensing decision a specific issue it agrees is material to that decision.' " NIRS v. NRC, 969 F.2d 1169, 1174 (D.C. Cir. 1992) (en banc) (emphasis added) (quoting UCS II, 920 F.2d at 54).

of the hearing is limited to the license application. See 10 C.F.R. § 72.46(a). There are many aspects of post-licensing facility construction and operation that intervenors are not permitted to litigate as part of the licensing process. Intervenors are not permitted, for example, to litigate a licensee's compliance with generic license conditions. See 10 C.F.R. § 72.44 (e.g., operation of ISFSI by certified personnel, compliance with technical specifications, compliance with the security plan). Intervenors are not permitted to litigate the procedures by which a licensee will implement its emergency plan. Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1106-1107 (1983). Intervenors are not permitted to litigate worker training procedures, in that the training program, but not the procedures, are part of the license application. See 10 C.F.R. § 72.24(h), 72.44(b)(4), 72.192. Intervenors are not permitted to litigate whether the construction of the ISFSI complies with the Safety Analysis Report. See 10 C.F.R. § 72.70. All of these issues are relevant to the safe construction and operation of the facility but they are not litigable in a licensing proceeding. Even assuming that PFS's compliance with the proposed license conditions were relevant to safe operation of the PFSF, confirmation of PFS's compliance would be performed as part of the inspection process after licensing, as with the foregoing items. See LES, CLI-97-15, 46 NRC at 307-08 & n.20. Therefore, PFS's compliance with the proposed financial license conditions and the means by which PFS would do so are not litigable here. Thus, approving of PFS's financial qualifications on the basis of its commitments would not deny the State its right to a hearing and Basis 11 must be dismissed.

2. The Staff's Proposed License Conditions Do Not Improperly Grant PFS an Exemption from the Commission's Regulations

Basis 12 asserts that the Staff's proposed license conditions improperly grant PFS an exemption (or waiver) to 10 C.F.R. §§ 72.22(e) and 72.40(a)(6). State Req. at 4. Basis 12 must be dismissed because it mischaracterizes the Staff's license conditions and PFS's financial commitments. A contention must be dismissed where "[it does] not accurately address the Applicant['s] proposal."[19]

PFS has not requested, nor has the Staff granted PFS, an exemption from or a waiver of the Part 72 financial qualifications requirements. See PFS Utah E Mot. at 3, 7-9; SER at 17-1 to 17-4, 17-7. As set forth above in response to Basis 11, PFS's financial commitments, and the proposed license conditions that would bind PFS to its commitments, establish PFS's financial qualifications under the literal language of Part 72 and the Commission's decision in the LES case. Therefore, no exemption or waiver is necessary. Thus, Basis 12 must be dismissed as failing to assert a genuine dispute with the applicant. 10 C.F.R. § 2.714(b)(2)(iii).

3. The Staff's Proposed License Conditions Do Provide Adequate Standards Against Which PFS's Performance Can Be Judged

Basis 13 asserts that the Staff's proposed license conditions do not provide adequate standards or procedures against which PFS's performance "and therefore its ability to meet the financial qualification requirements of 10 C.F.R. §§ 72.22(e) and 72.40(a)(6), can be judged." State Req. at 4-5. The State claims that the license conditions are

[19] Carolina Power & Light Company (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2082 (1982); see LBP-98-7, 47 NRC at 181 ("a contention that fails directly to controvert the license application . . . or that mistakenly asserts the application does not address a relevant issue is subject to dismissal").

"vague and open-ended" and do not "establish procedures for making or challenging these future determinations" and hence deprive the State of its right to a hearing. Id. at 5.

First, Basis 13 must be dismissed as a collateral attack on the Commission's regulations and its LES decision. See LBP-98-7, 47 NRC at 179. As set forth above in response to Basis 11, PFS's financial commitments are very similar to the applicant's commitments in LES and the license conditions that will bind PFS to its commitments are very similar to those the Commission imposed on the applicant in LES. Compare PFS Utah E Mot. at 7-9; SER at 17-4; LES, CLI-97-15, 46 NRC at 309. As would have been the case had the LES project gone forward, PFS, after licensing but before construction and operation, will respectively submit to the NRC information showing that it has committed funding sufficient to cover PFSF construction costs and information showing that it has customer Service Agreements sufficient to cover operation and maintenance costs (plus the amortization of construction debt, if any). In that manner it will demonstrate its compliancy with the license conditions. See LES, CLI-97-15, 46 NRC at 307-09 & n.20. PFS's commitment approach to demonstrating its financial qualifications (and the Staff's proposed license conditions) do not ask the Commission to do more than it did in LES. Therefore, the State's attack on PFS's approach is an attack on the LES decision and cannot form the basis for an admissible contention.

As set forth in response to Basis 11, it is the Commission's prerogative to determine which issues are material to licensing and thus open to public participation. Massachusetts v. NRC, 924 F.2d at 331. In LES, the Commission interpreted its regulations such that the determination of whether the applicant had complied with the financial license conditions was not material to licensing, rather, it would be made by the NRC by

inspection after licensing but before facility construction and operation. See LES, CLI-97-15, 46 NRC at 307-09 & n.20; UCS I, 735 F.2d at 1449 & n.23 (under the Administrative Procedure Act, decisions based on inspections may be exempted from the hearing process). Here, given PFS's commitments and the Staff's proposed license conditions, the NRC would also conduct inspections to determine after licensing but before facility construction and operation whether PFS had complied with the conditions. Staff Resp. at 12-13. A challenge to the Commission's interpretation of its regulations in LES may not serve as a basis for a contention. Therefore, the determination of PFS's compliance with the Staff's proposed financial license conditions is simply beyond the scope of this licensing proceeding and a challenge to how that determination might be performed cannot provide the basis for a contention.

Basis 13 must also be dismissed because it mischaracterizes the license conditions and PFS's financial commitments. Harris, LBP-82-119A, 16 NRC at 2082; see LBP-98-7, 47 NRC at 181. The State wrongly claims that the proposed license conditions are "vague and open-ended" and provide no standards against which PFS's performance can be judged. State Req. at 4-5. On the contrary, the license conditions provide clear standards against which PFS's performance can be judged.

The first condition requires PFS to have, before construction begins, "funding (equity, revenue, and debt) . . . fully committed that is adequate to construct a Facility with the initial capacity as specified by PFS to the NRC." SER at 17-4. The condition is clear—the cumulative amount of committed equity, revenue (from customer Service Agreements) and debt committed to PFS must be greater than or equal to the estimated

total cost of constructing the PFSF.[20] The estimated cost of construction will be determined by litigating admitted Contention Utah E Basis 6. See LBP-98-7, 47 NRC at 253; PFS Utah E Mot. at 4, 10. Thus, to confirm that PFS has complied with the license condition, before the PFSF is built the NRC will conduct an inspection in which it will compare the amount of committed funding to the litigated cost of construction. Staff Resp. at 12-13. There will be nothing vague or open-ended about the process.[21]

The second condition requires PFS, before operation begins, to "ha[ve] 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." SER at 17-4. That condition is also clear—PFS must have Service Agreements with cumulative prices sufficient to cover all the costs of operating, maintaining, and decommissioning the PFSF.[22] Like the cost of construction, the cost of operating and maintaining the PFSF will be determined by litigating admitted Contention Utah E Basis 6. See LBP-98-7, 47 NRC at 252; PFS Utah E Mot. at 4, 10. Thus, to confirm PFS's compliance with the license condition, before the PFSF is operated the NRC will conduct

[20] The State's argument that PFS will be unable to obtain debt financing for construction because it will have insufficient collateral, in that any Service Agreement revenue that is used to fund construction will be unavailable as collateral, State Repl. at 8-9, is immaterial. If PFS needs but cannot obtain debt financing, then PFS simply will not be allowed to build the PFSF.

[21] The first condition also states that "[c]onstruction 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." SER at 17-4. Thus, if PFS sought to increase its capacity beyond the initial capacity specified to the NRC, it would have to demonstrate that it had additional committed funding equal or greater than the cost of the additional capacity.

[22] The State attempts to obfuscate the nature of the licensing condition by arguing that "long-term" is undefined and hence all the operating and maintenance costs of the PFSF might not be covered by PFS's Service Agreements. See State Repl. at 8-10 (suggesting that like the LES applicant, PFS's Service Agreements will only cover five years of storage). On the contrary, the condition clearly states that the Service Agreements must cover the costs for "the entire term" of the agreements, i.e., cumulatively they must cover the entire cost of operating and maintaining the PFSF.

an inspection in which it will compare the cumulative prices of the customer Service Agreements, except for any amount used to fund facility construction, to the total cost of operating and maintaining the PFSF. Staff Resp. at 12-13. There will be nothing vague nor open-ended about the process.[23]

The State has attempted in numerous places to create the impression that PFS's commitments and the Staff's proposed license conditions will, e.g., "allow PFS to load the facility with debt during the construction stage thereby jeopardizing future safe operation of the facility." State Repl. at 8; see State Resp. at 9, 12-13. This is patently false and thus cannot form the basis for the admission of a contention. PFS has plainly stated that "[u]nder [its] commitment, operations will not begin until Service Agreements are in place that are sufficient to fully cover the costs of operating and maintaining the facility, including the amortization of any debt used to finance construction of the PFSF." PFS Utah E Mot. at 8 (citing Parkyn Dec. at ¶ 7) (emphasis added). Debt service will be covered by PFS's service agreements like other O&M costs and hence will not undermine PFS's financial qualifications.

Therefore, for the foregoing reasons, PFS's funding commitments and the Staff's proposed license conditions are neither vague nor "open-ended." Furthermore, as set forth above in response to Basis 11, an NRC determination that PFS was financially qualified on the basis of its commitments and the Staff's proposed license conditions would not deprive the State of its right to a hearing. Thus, Basis 13 must be dismissed:

[23] The proposed license condition requires PFS to have Service Agreements in place sufficient to cover the costs operating and maintaining the PFSF over the entire term of the agreements. Thus, if PFS wishes to expand the capacity of the PFSF it will have to have Service Agreements in hand sufficient to cover the additional operating and maintenance costs before it will be allowed to bring the additional capacity into operation.

1) as set forth above, because it is an attack upon the Commission's LES decision, see LBP-98-7, 47 NRC at 179, and 2) because it fails to present a genuine dispute with the applicant on a material issue of law or fact, 10 C.F.R. § 2.714(b)(2)(iii).

B. The State's Request Must Also Be Denied as Unjustifiably Late

The State's request to admit late-filed bases for Contention Utah E must be denied because it is unjustifiably late. Late-filed contentions or new bases to admitted contentions must pass the five-factor test of 10 C.F.R. § 2.714(a)(1).[24]

The State's request to admit late-filed bases for Utah E must be denied because the State lacks good cause for its lateness. While the State couches its late bases as challenges to the Staff's proposed financial license conditions in the SER, the appropriate challenge is to PFS's commitment approach to demonstrating its financial qualifications.[25] Indeed, in its request for admission of the bases, the State admits that "[t]he license conditions are based on the funding commitments made by the Applicant." State Req. at 5.[26] PFS first set forth its commitment concerning construction costs in an RAI Response dated September 15, 1998 – more than 16 months ago.[27] Further on June 28, 1999 – more than six months ago – PFS objected to producing marketing related docu-

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[24] LBP-98-7, 47 NRC at 182-83; Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 255 & n.15 (1996) (late-filed basis).

[25] It is well established that "[w]ith the exception of NEPA issues, the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC staff performance." 54 Fed. Reg, 33,168 and 33,172. (Statement of Considerations for "Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process").

[26] The State later admits that "[i]n its two pleadings responding to the Applicant's Summary Disposition Motion [State Resp. and State Repl.], the State has addressed many of the same issues that are pertinent to the admission of this Request." State Req. at 5. It then goes on to incorporate the pleadings by reference and "summarize[] and cross-reference[]" them in its request. Id. Thus, the State's request "could have been put forth with . . . specificity" after PFS filed its Utah E motion and hence that is the time from which lateness must be judged. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) LBP-98-29, 48 NRC 286, 292 (1998).

[27] Parkyn Dec. supporting PFS Utah E Summary Disp. Motion at ¶ 5.

ments during discovery on the basis of this commitment (and its intent to adopt an analogous commitment for operating costs).[28] Finally, PFS fully set forth its commitments for construction and operation costs in its motion for summary disposition filed with respect to Utah E on December 3, 1999 – almost two months before the State request.

Thus, the State has known for months of PFS's adoption of the LES commitment approach for establishing its financial qualifications. Moreover even giving the State the benefit of December 3, 1999 Utah E motion date, the State's amended bases were not filed until January 26, 2000, or 54 days afterwards. The Board has described 45 days as "approaching the outer boundary of 'good cause'."[29] Hence, the State's request is unjustifiably late, even under the latest date.

Good cause is the preeminent requirement of section 2.714(a)(1) and failure to meet it "mandates a compelling showing in connection with the other four factors" to obtain the admission of a late contention. Private Fuel Storage, supra note 26, LBP-98-29, 48 NRC at 293. The State fails to make such a compelling showing. First, the State failed to show that it would contribute to the sound development of the record (factor three), in that its expert affidavit it filed with its request does not "summarize [the expert's] proposed testimony" on the new bases, see LBP-98-7, 47 NRC at 208-09, but rather merely incorporates by reference his declaration filed with the State's response to PFS's motion. See Sheehan Dec. at ¶ 6 (January 26, 1999). Such a skeletal proffer is in-

[28] Applicant's Objections and Proprietary Responses to State's Second Requests for Discovery at 5-7, 9, 13, June 28, 1999, (responses to Utah E Document Request 4,7,11, and 19); see also Applicant's Objections and Proprietary Responses to State's Third Request for Discovery at 4, 6, June 28, 1999, (responses to Utah E Document Request 1, and 6).

[29] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) LBP-99-3, 49 NRC 40, 47 (1999).

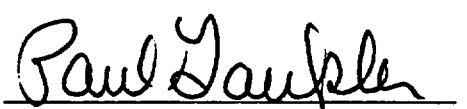
sufficient to satisfy factor three. See LBP-98-29, 48 NRC at 294. Second, admitting the State's bases would broaden and, at this date, delay the proceeding (factor five). Admission of new bases will by definition broaden the proceeding and at this date, after the close of discovery on Utah E prior to the hearing, will delay it as well. See South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 888-89 (1981).

The other factors relating to the protection of the State's interest (two and four) are accorded less weight than factors three and five (and much less than good cause, factor one). LBP-98-29, 48 NRC at 294. Therefore, lacking good cause, the State fails to make a compelling showing on the other four late-filing factors and hence its request for the admission of late-filed bases for Utah E must be denied.

III. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Board deny Utah's request to admit its late-filed bases for Contention Utah E.

Respectfully submitted,



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February 4, 2000

ATTACHMENT A

STATE OF UTAH LATE-FILED BASES FOR UTAH CONTENTION E

Basis 11: The Staff's proposed license conditions LC17-1 and LC17-2 (SER at 17-7) contravene the financial qualification requirements of 10 CFR §§ 72.22(e) and 72.40(a)(6), which require a substantive determination of financial qualification before a license is issued. The proposed license conditions do not assure that the Applicant will be financially qualified at the time the license is issued because the Applicant neither possesses the necessary funds, nor has reasonable assurance of obtaining the necessary funds to cover estimated construction costs, estimated operating costs over the planned life of the ISFSI, and estimated decommissioning costs. Postponing the financial qualification analyses and determination to post-hearing resolution also violates Intervenor State of Utah's and other parties' rights to a prior hearing on all financial issues material to the licensing decision, and is contrary to Section 189(a)(1) of the Atomic Energy Act.

Basis 12: The Staff's proposed license conditions LC17-1 and LC17-2 (SER at 17-7) improperly grant to PFS an exemption to 10 CFR §§ 72.22(e) and 72.40(a)(6), without a request by the Applicant and without meeting the standards for exemption under 10 CFR § 72.7 or the standards for rule waiver under 10 CFR 2.758.

Basis 13: The Staff's proposed license conditions LC17-1 and LC17-2 (SER at 17-7) do not provide adequate standards or procedures against which Applicant's performance, and therefore its ability to meet the financial qualification requirements of 10 CFR §§ 72.22(e) and 72.40(a)(6), can be judged. The licensing conditions are vague and open-ended, and do not establish procedures for making or challenging these future determinations. As a consequence, the licensing conditions completely deprive the State and other parties of a full and fair hearing on the issue of whether the Applicant is financially qualified to operate an ISFSI in Utah.

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22
	)	
(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Response to State of Utah's Request for Admission of Late-Filed Bases for Utah Contention E" and Attachment A were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 4th day of February 2000.

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