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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

2000 FEB 03 P 4 24

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of:	)	Docket No. 72-22-ISFSI	AD
PRIVATE FUEL STORAGE, LLC	)	ASLBP No. 97-732-02-ISFSI	
(Independent Spent Fuel	)		
Storage Installation)	)	January 26, 2000	

**STATE OF UTAH'S REQUEST FOR ADMISSION OF  
LATE-FILED BASES FOR UTAH CONTENTION S**

**Introduction**

Pursuant to 10 CFR § 2.714, the State of Utah hereby seeks the admission of late-filed new Bases 12 and 13 for Utah Contention S, which challenges the adequacy of the Applicant's decommissioning plan. This Request is being made as a result of NRC Staff's issuance of the Safety Evaluation Report ("SER"). As discussed below, this Request for Admission of Late-filed Bases for Utah Contention S satisfies the Commission's criteria for admission of late-filed contentions. This Request is supported by the Declaration of Dr. Michael F. Sheehan, attached hereto as Exhibit 1.

**Procedural Background**

The State's original Contention S, and its bases one, two, four, five, and ten, were admitted by the Licensing Board in Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 196-197, 255, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998). The Contention as admitted by the Board states:

The decommissioning plan does not contain sufficient information to provide reasonable assurance that the decontamination or decommissioning of the ISFSI at the end of its useful life will provide adequate protection to the health and safety of the public as required by 10 C.F.R. § 72.30(a), nor does the decommissioning funding plan contain sufficient information to provide reasonable assurance that the necessary funds will be available to decommission the facility, as required by 10 C.F.R. § 72.22(e).

47 N.R.C. at 255. The State of Utah is not proposing to amend this Contention, but is proposing to add new bases for the Contention.

In the SER dated December 15, 1999<sup>1</sup>, the Staff accepted the Applicant's proposal to require payment of decommissioning costs at the time a cask is accepted for storage rather than before the start of operations. SER at 17-5, -6. The Staff acknowledged that this arrangement:

constitutes a departure from the language in 10 CFR 72.30(c)(1), which indicates that if an applicant selects prepayment as the method of decommissioning funding, payment should be made "prior to the start of operation."

Id. at 17-5.

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<sup>1</sup> The SER dated December 15, 1999 was originally received by the State on December 27, 1999. The original SER had two proposed license conditions different from those described in the Staff's Response to the Applicant's Partial Motion for Summary Disposition of Utah Contention E, filed on December 22, 1999. The Staff recalled and replaced the original SER to reconcile the different license conditions. Although the cover memo from Mark Delligatti, forwarding the SER which replaces Chapter 17 (Financial Qualifications and Decommissioning Funding Assurance) in the original SER, is dated January 7, 2000, the State received the revised SER with the Chapter 17 replacement on January 18, 2000.

References made in this document to the SER are, unless otherwise stated, references to the reissued document dated January 7, 2000.

## **Requested New Bases**

The State proposes to add two new bases in support of its Contention S, as follows:

Basis 12: The Staff's proposed acceptance (SER at 17-5, -6) of the Applicant's proposal to require payment of decommissioning costs at the time a cask is accepted for storage rather than before the start of operations is in violation of the requirements of 10 CFR § 72.30(c)(1).

Basis 13: The Staff's proposed acceptance (SER at 17-5, -6) of the Applicant's proposal to require payment of decommissioning costs at the time a cask is accepted for storage rather than before the start of operations improperly grants to the Applicant an exemption to 10 CFR § 72.30(c)(1), 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 for Request**

In the SER, the Staff accepts PFS's proposal to require payment of decommissioning costs funds for each canister at the time a cask is accepted for storage rather than before the start of operations of the ISFSI. SER at 17-5. The Staff's position violates the requirements of 10 CFR § 72.30(c)(1). The State must therefore request modification of its bases for Contention S to reflect the Staff's position and its failure to comply with NRC rules.

NRC regulation 10 CFR § 72.30(c) states "[f]inancial assurance for

decommissioning must be provided by one or more of [several methods].” The Applicant has chosen to fund decommissioning using the prepayment option. LA (Rev 0), App. B, at 5-1. “Prepayment is the deposit *prior to the start of operation* . . . such that the amount of funds would be sufficient to pay decommissioning costs.” 10 CFR § 72.30(c)(1) (*emphasis added*). However, contrary to 10 CFR § 72.30(c)(1), the Staff will allow PFS to use the prepayment option but not to fund the cost of decommissioning prior to start of operations. SER at 17-5.

The Staff itself acknowledge its position is a departure from the rules. The Staff states that the language in 10 CFR § 72.30(c)(1) “indicates that if an applicant selects prepayment as the method of decommissioning funding, payment should be made ‘prior to the start of operation.’” *Id.* The Staff then, in effect, ignores the regulations and determines that the decommissioning funding plan provides reasonable assurance of adequate funding. *Id.* at 17-5, -6. The Staff adds that “exemption from strict compliance with the language in 72.30(c)(1)” will be issued if necessary, but does not discuss whether or how the Applicant can meet the requirements for exemption from the rule. *Id.* at 17-6. PFS has not requested an exemption to 10 CFR § 72.30(c). The Staff on its own volition has accepted the departure from the rules.

“It is a well-known maxim that agencies must comply with their own regulations.” Yakima Indian Nation v. Federal Energy Regulatory Commission, 746 F.2d 466, 474 (9th Cir. 1984), *cert. denied sub nom Public Utility District of Chelan County, Washington v. Confederated Tribes and Bands of Yakima Indian Nation, 471 U.S. 1116 (1985); *see also**

National Family Planning and Reproductive Health Assoc. v. Sullivan, 979 F.2d 227, 234 (D.C. Cir. 1992). The Staff here is not following its own regulations. As discussed in the State's January 10, 2000 Reply to the NRC Staff's Response to Applicant's Motion for Partial Summary Disposition of Utah Contention E (hereinafter "State's Reply"), if the Staff wishes to change its regulations, it must comply with the procedures described in the Administrative Procedures Act. *See* State's Reply at 5-6. Here, the Staff has improperly granted to the Applicant an exemption to 10 CFR § 72.30(c)(1), 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.

The Commission has recently ruled that a Board is not authorized to grant exemptions from a rule, or even to acquiesce in arguments that would result in the rule's circumvention. *See* Gulf States Utilities Company (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 473 (1995).

Further, even if it were appropriate to grant an exemption to the rule in some cases, it is not appropriate in this case. Allowing the Applicant to avoid compliance with 10 CFR § 72.30(c) in the manner the Staff suggests will not provide reasonable assurance of decommissioning funding. Applicant's proposed method of payment per cask at the time waste is accepted does not provide assurance of adequate funding because the cost per cask is based on a best case scenario. *See* Sheehan Dec. at ¶ 7. Variations from that scenario would be expected to result in substantial additional costs.

Finally, it must be recognized that there will be an escalation of estimated

decommissioning costs as time goes on. PFS has made no provision for increasing its cost per cask. Because PFS will not have the benefit of the time-value of monies, as it would for prepayment made prior to operation, decommissioning funds for waste received later in the facility's life would be inadequate. *See Sheehan Dec.* at ¶ 7.

### **Satisfaction of Late Filed Factors**

The State meets the 10 CFR § 2.714(a) late filed factors for amending the bases for its Contention S.

### **Good Cause**

The Board has indicated that late-filed contentions should be submitted no later than thirty days after the SER is made available to the public. Memorandum and Order (General Schedule for Proceeding and Associated Guidance), at 5 (June 29, 1998). In its order, the Board requested that the Staff notify the intervenors of "its intent to make the [SER] publicly available no later than fifteen days before the [SER is] issued publicly." *Id.* When the Staff filed the Statement of Its Position Concerning Group I-II Contentions on December 15, 1999, the Staff mentioned that the SER was being issued on the same date. On or about December 15, 1999, the State requested a copy of the SER from the Staff and was told that the SER had been sent to the printers and that the State, along with others on the service list, would be served with a copy after the SER was printed.<sup>2</sup> Thus, the State did not receive 15 days' advance notice that the Staff was about to issue the

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<sup>2</sup> Telephone conversation between counsel for the Staff and counsel for the State.

SER. The State only learned of the Staff's evaluation of decommissioning funding when it received a copy of the SER. Although the SER is dated December 15, 1999, the State did not receive a copy of the SER until December 27, 1999.

Moreover, through memorandum dated January 7, 2000, the Staff recalled and replaced the chapter of the SER that is pertinent to this Request, Chapter 17 - Financial Qualification and Decommissioning Funding Assurance. The State received the revised SER with replacement Chapter 17 on January 18, 2000.

For these reasons, the State's Request for Admission of Late-filed Bases for Utah Contention S is timely.

#### **Development of a Sound Record**

The State's participation, and the testimony of its expert Dr. Michael F. Sheehan in this matter will assist in developing a sound record. As described in numerous filings, Dr. Sheehan has extensive expertise over the past 20 years in the economics and financing of project planning and regulation. *See* Sheehan Dec. ¶ 3; State Response, Exhibit 1 at ¶¶ 1 through 4. For the past 20 years Dr. Sheehan has focused on the economics and finance of project planning and regulation. Many of the same issues in the new basis for Contention S are the same as those contained in Contention E. Thus, the testimony described in today's request to add bases to Utah Contention E is also relevant to the new bases for Contention S. Dr. Sheehan would also testify about the consequences of not providing up-front payment of all decommissioning costs prior to operation of the PFS ISFSI. *See* Sheehan Dec. ¶ 8. Dr. Sheehan's testimony and

participation will give the Board a different and important perspective on the Applicant's financial qualifications for decommissioning.

**Availability of Other Means for Protecting The State's Interests**

The State has no alternative means, other than this proceeding, for protecting its interest in assuring that the Applicant has adequate financial assurance for decommissioning.

**Representation by Another Party**

The State's position will not be represented by any other party, as there is no other party with a similar contention admitted to this proceeding.

**Broadening of Issues or Delay of the Proceeding**

The Staff's actions challenged in this Request are integral to matters that are the subject of Contention S. Admission of the additional requested bases will therefore not broaden the proceeding beyond the scope initially envisioned in LBP-98-7. The admission of these additional bases will not cause any overall delay in the proceeding.



### Conclusion

For the foregoing reasons, the State's additional bases for Contention S are both admissible and meet the Commission's standard for late filed contentions. Accordingly, they should be admitted.

DATED this 26th day of January 2000.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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I hereby certify that a copy of STATE OF UTAH'S REQUEST FOR  
ADMISSION OF LATE-FILED BASES FOR UTAH CONTENTION S was served on  
the persons listed below by electronic mail (unless otherwise noted) with conforming  
copies by United States mail first class, this 26<sup>th</sup> day of January, 2000:

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