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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-00007TED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

OFFICE OF THE
ADMINISTRATIVE JUDGES

SERVED MAR 10 2000

In the Matter of

PRIVATE FUEL STORAGE, L.L.C.

(Independent Spent Fuel
Storage Installation)

Docket No. 72-22-ISFSI
ASLBP No. 97-732-02-ISFSI
March 10, 2000

MEMORANDUM AND ORDER
(Denying Request for
Admission of Late-Filed Bases for
Contention Utah E/Confederated Tribes F)

By motion dated January 26, 2000, intervenor State of Utah (State) seeks the admission of what it labels three late-filed bases for previously admitted contention Utah E/Confederated Tribes F, Financial Assurance. These so-called late-filed bases, numbered eleven, twelve, and thirteen, which in reality are new subparts of its earlier admitted contention, reflect State concerns about the financial assurance analysis set forth in the recently issued NRC staff Safety Evaluation Report (SER) for the proposed Skull Valley, Utah 10 C.F.R. Part 72 independent spent fuel storage installation at issue in this proceeding. Applicant Private Fuel Storage, L.L.C., (PFS) opposes the admission of these additions to the contention, alleging

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they fail to meet the 10 C.F.R. § 2.714(a)(1) standards governing late-filed issues and fail to specify litigable issues under the criteria of 10 C.F.R. § 2.714(b)(2), while the NRC staff supports the admission of basis thirteen.

For the reasons set forth below, we deny the State's late-filed admission request in toto.

I. BACKGROUND

As we detail in another Board decision regarding this contention that we issue today, see LBP-00-06, 51 NRC ___, ___ (slip. op. at 6-9) (Mar. 10, 2000), as admitted, contention Utah E/Confederated Tribes F with its ten subparts challenges various aspects of the adequacy of the financial qualifications construct for the proposed PFS facility, see LBP-98-7, 47 NRC 142, 251-52, reconsideration denied, LBP-98-10, 47 NRC 288, 294-95, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998). In a December 3, 1999 motion for partial summary disposition that is the subject of LBP-00-06, PFS has sought a judgment in its favor on all but one of these ten subparts. The State opposes this request, while the staff supports the PFS dispositive motion.

As the primary foundation for its support of the PFS motion, the staff relies upon two proposed license conditions that would require PFS to fulfill certain commitments prior to beginning construction and operation of

its proposed facility. As set forth in the staff's December 15, 1999 SER for the PFS facility, they provide:

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.

Safety Evaluation Report of the Site-Related Aspects of the [PFS] Facility [IFSFI] at 17-7 (Dec. 15, 1999, as revised Jan. 4, 2000).

In response to these proposed license conditions, the State seeks the late-filed admission of three additional subparts for contention Utah E/Confederated Tribes B. These provide:

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.

[State] Request for Admission of Late-Filed Bases for Utah
Contention E (Jan. 26, 2000) at 4-5 [hereinafter State

Request]. According to the State, under the late-filing criteria of 10 C.F.R. § 2.714(a)(1), good cause exists for the late-filing of these bases because they were submitted within thirty days of the January 7, 2000 date the staff made the SER with these conditions publically available. See id. at 7-8; [State] Reply to [PFS] and NRC Staff's Responses to Utah's Request for Admission of Late-Filed Bases for Utah Contention E (Feb. 11, 2000) at 14-16 [hereinafter State Reply]. Further, the State declares that the other four late-filing factors also support admission in that (1) its challenges are supported by the testimony of Michael F. Sheehan, Ph.D., its financial assurance expert, thereby establishing its ability to develop a sound record; (2) it has no other means to protect its interests because if the license conditions remain intact as a result of the Board's summary disposition ruling, it will have no other opportunity to challenge them; (3) no other party will represent its position because none has a similar admitted contention; and (4) admitting these issues will focus the proceeding on the staff's action without broadening its scope beyond the already admitted issue or delaying the proceeding. See id. at 9-10; State Reply at 17-18. Finally, it asserts that the admission of these contentions is appropriate for, as is discussed at some length in the State's two filings in connection with the PFS partial

summary disposition motion, they frame cognizable legal and factual issues including (1) the proposed license conditions violate the financial assurance requirements applicable to the PFS facility under 10 C.F.R. §§ 72.22(e), 72.40(a)(6), because they permit licensing in the absence of a PFS demonstration that it is financially qualified; (2) they constitute the improper staff grant to PFS of an exemption from the financial assurance requirements of Part 72; (3) they are based on an improper reading of the Commission's decision in Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997); (4) they are impermissibly vague, ambiguous, and unenforceable; and (5) they permit a post-license review of financial assurance that violates the State's right to a hearing. See id. at 5-7; State Reply at 3-14.

PFS opposes the admission of the late-filed additions to contention Utah E/Confederated Tribes F, asserting that (1) there is no "good cause" under factor one because the additions should have been filed shortly after PFS first set forth its construction costs commitment in a September 1998 response to a staff requests for additional information (RAI), after PFS refused to answer discovery questions about market-related documents in June 1999, or after the PFS December 3, 1999 partial summary disposition motion; and (2) the balance of the other four factors do not support

admission either, particularly given that the more heavily weighted factors three and five -- sound record development contribution and broadening issues/delay -- weigh against admission. See Applicant's Response to [State] Request for Admission of Late-Filed Bases for Utah Contention E (Feb. 4, 2000) at 18-20. Additionally, PFS asserts that the various legal and factual challenges set forth in the late-filed subparts are not admissible issues because (1) they constitute a challenge to the agency's financial qualifications regulations as interpreted and applied by the Commission in its Claiborne decision; (2) consistent with the Commission's Claiborne decision, PFS does not need an exemption from the Part 72 financial assurance requirements; and (3) they mischaracterize the license conditions and, as such, do not establish a genuine dispute on a material issue of law or fact. See id. at 3-18.

The staff, on the other hand, declares that the three new subparts do not run afoul of the late-filing criteria of section 2.714(a)(1), principally because it concludes there was good cause for the State filing, coming as it did within thirty days of the early January 2000 date on which the revised SER containing the proposed license conditions was made publically available. See NRC Staff's Response to "[State] Request for Admission of Late-Filed Bases for Utah Contention E" (Feb. 4, 2000) at 6-9 [hereinafter Staff

Response]. Relative to the three subparts' admissibility under section 2.714(b), the staff finds subparts eleven and twelve inadmissible because they are footed in a misreading of the Part 72 financial assurance regulations and the Commission's interpretation of those regulations in Claiborne and its June 1998 guidance to the Board in this proceeding, see CLI-98-13, 48 NRC at 36-37. See Staff Response at 10-14. The staff, however, does not oppose the admission of basis thirteen, concluding it appropriately raises a factual issue about the adequacy of the staff's license conditions. See id. at 15-16.

II. ANALYSIS

We recently observed that although a presiding officer generally first analyzes the question of a late-filed issue's admissibility under the 10 C.F.R. § 2.714(a)(1) criteria before turning to the question of its admissibility under the specificity and basis requirements of section 2.714(b)(2), there may be instances when the latter point is so clearly dispositive that it is all that needs to be addressed. See LBP-00-01, 51 NRC 1, 5 (2000). Such a circumstance is before us again.¹

¹ Although we conclude it is unnecessary to delve into the section 2.714(a)(1) five-factor balancing analysis here, we do consider it appropriate to provide some observations relative to the question of "good cause." In our June 1998 (continued...)

In a separate ruling issued this date, we grant in part a December 3, 1999 PFS motion for partial summary

¹(...continued)

issuance providing a general schedule for this proceeding and associated guidance for its conduct, we declared that, in connection with late-filed contentions based on the staff SER and its draft and final environmental impact statements (DEIS and FEIS) relating to the proposed PFS facility, any issue statements should be filed within thirty days of these documents being made available to the public. This statement regarding timing, however, had two important caveats. We requested that the staff (1) notify the intervening parties and the Board of its intent to make these documents publicly available at least fifteen days prior to their public issuance; and (2) take steps to see that the intervenors are notified of the actual public release of these documents and their availability on an expedited basis. As we noted there, the former request was intended to provide the intervening parties with an opportunity to ensure the availability of their experts to review these documents promptly. See Licensing Board Memorandum and Order (General Schedule for Proceeding and Associated Guidance) (June 29, 1998) at 4-5 (unpublished).

From the un rebutted representations in the State's motion and the record surrounding our previous ruling on a dispute relating to a staff motion to strike portions of a State pleading relating to contention Utah E/Confederated Tribes F, see State Motion at 7-8; Licensing Board Memorandum and Order (Denying Motion to Strike Pleading) (Feb. 4, 2000) at 5 (unpublished), it appears that the staff's notice to the State was contemporaneous with December 15, 1999 "issuance" of the SER (i.e., the issuance date assigned by the staff). On that date, however, the document apparently was not ready for public distribution and, indeed, the time it took to print and distribute the SER resulted in the State not having a copy until December 27, 1999, twelve days after the State was notified the SER had been issued. This sequence of events does not seem particularly responsive to the Board's requests regarding notice and availability of the SER. Whether the staff will be more mindful of our requests when it comes to the DEIS and FEIS remains to be seen. Its actions in this regard undoubtedly will be a factor in any Board determination regarding the timeliness of intervenor late-filed contentions relating to these significant environmental documents.

disposition of contention Utah E/Confederated Tribes F. In so doing, we there address the various State arguments that are the substance of the three additional contention bases it now seeks to have us admit as late-filed. Our ruling in favor of PFS on these points in the context of that decision resolves those matters. See CLI-00-06, 51 NRC at ___ (slip op. at 22-35) (Mar. 10, 2000). As a consequence, they do not here constitute a genuine dispute on a material issue of law or fact so as to be admissible in this proceeding. See 10 C.F.R. § 2.714(b)(2)(iii). We thus find them inadmissible.²

III. CONCLUSION

In light of the Board's decision this date in LBP-00-06 on the PFS December 3, 1999 motion for partial summary disposition of contention Utah E/Confederated Tribes F, Financial Assurance, in which we rule in favor of PFS on the substance of the matters put forth by the State in the late-filed issues it seeks to have admitted in its

² Although the staff declares that subpart 13 regarding the vagueness and open-endedness of its proposed license conditions is admissible because it involves factual issues, see Staff Response at 15-16, its argument does not reflect our ruling this date on those State concerns in the context of the PFS summary disposition motion.

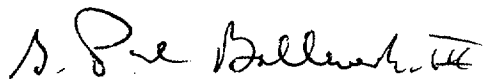
January 26, 2000 motion, we deny that motion as failing to put forth litigable issues.³

For the foregoing reasons, it is this tenth day of March 2000, ORDERED, that the State's January 26, 2000

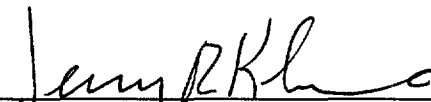
³ As part of that ruling, we refer our decision on the PFS dispositive motion to the Commission for its consideration. See LBP-00-06, 51 NRC at ___ (slip op. at 70-72). Although we do not refer this related ruling to the Commission, it is, of course, free to review our determination here if it wishes to do so.

request for admission of late-filed subparts of contention Utah E/Confederated Tribes F, Financial Assurance, is denied.

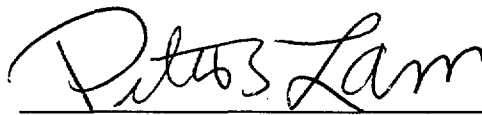
THE ATOMIC SAFETY
AND LICENSING BOARD⁴



G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE



Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE



Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

This memorandum and order is issued pursuant to the authority of the Atomic Safety and Licensing Board designated for this proceeding.

Rockville, Maryland

March 10, 2000

⁴ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PFS; (2) intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)

PRIVATE FUEL STORAGE, L.L.C.)

(Independent Spent Fuel Storage)
Installation))

Docket No. 72-22-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING REQUEST FOR ADMISSION OF LATE-FILED BASES FOR CONTENTION UTAH E/CONFEDERATED TRIBES F) (LBP-00-07) have been served upon the following persons by deposit in the U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No. 72-22-ISFSI
LB MEMORANDUM AND ORDER
(DENYING REQUEST FOR ADMISSION
OF LATE-FILED BASES FOR
CONTENTION UTAH E/CONFEDERATED
TRIBES F) (LBP-00-07)

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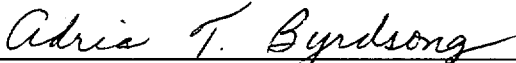
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 10th day of March 2000