UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-00-06

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, L.L.C.	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel Storage Installation)	March 10, 2000

MEMORANDUM AND ORDER
(Granting in Part, Denying in Part, and Referring Ruling on Summary Disposition Motion Regarding Contention Utah E/Confederated Tribes F)

In a December 3, 1999 motion, applicant Private Fuel Storage, L.L.C., (PFS) asks that the Licensing Board grant partial summary disposition in its favor on contention Utah E/Confederated Tribes F, Financial Assurance. With this issue, which the Board admitted in its April 1998 initial ruling on standing and contentions, see LBP-98-7, 47 NRC 142, 187, 215, 236, reconsideration denied, LBP-98-10, 47 NRC 288, 294-95, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998), intervenors State of Utah (State) and the Confederated Tribes of the Goshute Reservation (Confederated Tribes) seek to challenge various aspects of the financial

qualifications of PFS to construct and operate its proposed Skull Valley, Utah 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI). The State, as the lead intervenor for this issue, opposes the PFS motion, while the NRC staff supports the applicant's request. Additionally, in connection with this contention and the PFS motion the State has requested, as part of its December 27, 1999 response to the PFS motion and its January 10, 2000 reply to the NRC staff's December 22, 1999 response to the PFS motion, the release of all claimed proprietary information relating to the PFS summary disposition motion, which PFS and the staff oppose.

For the reasons set forth below, we grant in part and deny in part the PFS dispositive motion. We also deny the State's proprietary information release request. Moreover, because our determination on the PFS summary disposition motion concerns an issue of some importance that the Commission already has identified as sufficiently distinctive to warrant its attention in this proceeding, pursuant to 10 C.F.R. § 2.730(f), we refer our rulings on the PFS dispositive motion to the Commission for its further consideration.

I. BACKGROUND

A. PFS Financial Qualifications

In its license application, describing itself as a limited liability company owned by eight United States utilities, PFS states that its financial qualifications for the requested Part 72 license are, among other things, based on its financing plan to obtain the necessary funds to construct, operate, and decommission the proposed Skull Valley facility. According to PFS, among the financing mechanisms it will use are equity contributions from PFS members pursuant to subscription agreements, preshipment customer payments pursuant to service agreements (through which member and nonmember customers commit to store their spent fuel at the PFS facility and PFS agrees to provide storage services), and annual storage fee payments pursuant to the service agreements. PFS also indicates that it reserves the option to obtain portions of needed construction funds through the sale of debt securities secured by the service agreements. See [PFS], License Application for Private Fuel Storage Facility at 1-3 to -4 (rev. 0 June 1977).

PFS then goes on to describe its phased approach to construction and operation. Under already completed Steps I-III, PFS undertook preliminary investigations,

formed PFS as a legal entity, and prepared and submitted the license application, the last step being funded by direct payments from PFS members pursuant to the subscription agreements. Step IV, which includes this licensing proceeding, detailed design efforts, and bid specification preparations, is ongoing. The $10 million budgeted for this phase is being financed by PFS members payments pursuant to the subscription agreements. See id. at 1-5 (rev. 1 May 1998).

When and if a license is granted, Step V, the construction phase, will begin. This includes site preparation, construction of an access road and various administration, maintenance, and operations buildings and the cask storage pads, canister transfer and transport equipment procurement, and transportation corridor construction. Its $100 million budgeted cost (in 1997 dollars) is to be financed by $6 million dollars in equity contributions from PFS members pursuant to subscription agreements and, in larger measure, by the service agreements with PFS members and nonmember entities that call for payment spread out over the period of time from construction through spent fuel delivery. According to PFS, raising the nonequity portion of Step V costs through service agreements will allow it to avoid construction financing costs,

although it retains the option to finance the nonequity portion of Step V costs through debt financing secured by the service agreements. According to the PFS application, no construction will proceed unless service agreements committing for spent fuel storage services in a nominal target range of 15,000 metric tons uranium (MTU) have been signed. See id. 1-5 to -6 (rev. 1 May 1998 & rev. 4 Aug. 1999).

The operational phase for the PFS facility, Step VI, is to be funded by the service agreements. The significant budgeted costs for this phase include procurement and/or fabrication of canisters ($432 million) and storage casks ($134 million), which will be obtained on an as-needed basis to coincide with fuel-moving schedules. According to PFS, all capital costs associated with spent fuel transportation and storage, including canister and storage cask procurement and/or fabrication, will be paid pursuant to the service agreements prior to PFS accepting customers' spent fuel. Also under the service agreements, customers will be required annually to pay ongoing operations and maintenance costs for spent fuel storage, estimated to be $49 million annually for a twenty-year facility operating life and $31 million annually for a forty-year life. These costs include labor, operations support, storage canisters, storage casks,

transportation fees, transport and storage consumables, maintenance and parts, regulatory fees, quality assurance and other expenses, low-level radioactive waste disposal, contingencies, radiological and nonradiological decommissioning funds, and associated operating costs. PFS states that the service agreements will include escalators that are tied to specific costs of doing business at the site, including such items as labor rates and NRC and insurance fees. Also, according to PFS, service agreements, which must be signed by PFS members as well, will provide assurance of continued payment by requiring customers to provide annual financial information, meet creditworthiness requirements, and provide additional financial assurances (e.g., advance payments, irrevocable letters of credit, third party guarantees, or payment and performance bonds) as needed. See id. at 1-6 to -7 (rev. 0 July 1997 & rev. 4 Aug. 1999).

B. Contention Utah E/Confederated Tribes F

The contention that is the subject of the pending PFS dispositive motion challenges the adequacy of this financial qualifications construct. As admitted in LBP-98-7, contention Utah E/Confederated Tribes F provides as follows:

> 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.

47 NRC at 251-52. This contention represented consolidated portions of contentions Utah E, Confederated Tribes F, and Castle Rock 7. See id. at 187, 214-15, 236. Upon the later

withdrawal of sponsoring intervenors Castle Rock Land and Livestock, L.C., and Skull Valley Co., Ltd., the Board removed the reference to Castle Rock 7 from the contention's designation, although its substance remained unchanged because Castle Rock 7 had been adopted by remaining intervenor Confederated Tribes. See LBP-99-6, 49 NRC 114, 119-20 (1999). The Board also designated the State as the lead intervenor for this contention. See Licensing Board Memorandum and Order (Memorializing Prehearing Conference Rulings) (May 20, 1998) at 2 (unpublished).

In admitting this contention, the Board stated that "while differences between the financial qualifications requirements of 10 C.F.R. Part 50, including Appendix C, and those in 10 C.F.R. Part 72 suggest the Part 50 provisions are not applicable in toto to Part 72 applicants, we agree with the staff that Part 50 should be used as guidance in reviewing PFS's financial qualifications." LBP-98-7, 47 NRC at 187 (citation omitted). Thereafter, in ruling on the various appeals that were taken from the Board's April 1998 ruling on standing and contentions, the Commission observed that this statement was "consistent with our holding last year in Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 302 (1997), that financial qualifications standards established for reactor

licensing do not necessarily apply outside the reactor context." CLI-98-13, 48 NRC at 36. The Commission went on to provide the following guidance:

> In Claiborne the Commission imposed license conditions that bound the applicant to financial commitments that it had made during the licensing proceeding. The conditions had the effect of assuring financial qualifications and obviating further litigation on these issues. The parties and the Board may wish to consider the feasibility of license conditions in this proceeding, and the possibility that appropriate conditions may avoid difficult litigation over financial issues.
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> Our financial qualifications standards and other licensing regulations do not require the Board to undertake a full-blown inquiry into an applicant's likely business success. To 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.

Id. at 36-37 (citations omitted).

C. PFS Motion for Partial Summary Disposition

In its December 3, 1999 motion for partial summary disposition regarding contention Utah E/Confederated Tribes F, which it supports with a statement of fourteen material facts not in dispute, PFS asserts that there are no disputed material factual issues so that it is entitled to a merits ruling in its favor regarding all contention subparts

except six, for which it does not request summary disposition. See [PFS] Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (Dec. 3, 1999) at 3 [hereinafter PFS Motion]. The principal support for this result, according to PFS, is the attached statement of its Chairman, John Parkyn, in which he attests to the PFS commitments that:

> "PFS will not commence ISFSI construction unless and until it has committed funds sufficient to provide fully for the construction of an ISFSI (including PFS's administrative and operational costs during construction of the project) with an initial capacity of at least { }[1] MTU, whether these funds are obtained through equity contributions, through Service Agreements, or through other committed forms of financing . . . ,"

id. Declaration of John Parkyn (Dec. 2, 1999) at 2 (quoting Letter from John Parkyn, Chairman, PFS, to Director, NRC Office of Nuclear Materials Safety and Safeguards (Sept. 15, 1998) attach. B, PFSF LA RAI No. 1, Question 1-1, at 2 of 2) [hereinafter Parkyn Declaration], and

> "PFS will not commence operations of the PFSF, and will not accept spent nuclear fuel for storage at the PFSF, unless PFS has in place long term Service

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[1] Carrotted material, such as the figure set forth here and in the staff proposed license condition set forth on page 14, has been excised because it has been identified by PFS as proprietary information in accordance with 10 C.F.R. § 2.790.

> Agreements for spent fuel storage services with its members and and customers sufficient to cover the costs of operating and maintaining the facility with respect to the spent fuel to be accepted and stored under the contracts. The costs for the storage of additional spent fuel at the PFSF (beyond that contracted for under the initial Service Agreements at the commencement of operations) will simply be covered by long term Service Agreements for spent fuel storage services with PFS's members and customers. The costs of any additional construction necessary to enable the storage of additional spent nuclear fuel at the PFSF will be funded through equity contributions, the Service Agreements, or other committed forms of financing. . . ,"

id. at 3. According to PFS, consistent with the Commission's holding in Claiborne, CLI-97-15, 46 NRC at 303-09, these commitments are sufficient to demonstrate the requisite reasonable assurance under 10 C.F.R. § 72.22(e) that PFS is financially qualified to construct, operate, and maintain the Skull Valley facility.

In its December 22, 1999 response to this PFS motion, which is supported by the affidavit of staff financial analyst Alex F. McKeigney, the staff declares it agrees that PFS is entitled to partial summary disposition as requested. Initially, the staff notes that in April 1998, it directed a number of requests for additional information (RAIs) to PFS inquiring about various aspects of its financial assurance

for facility construction and operation and in a September 1998 response PFS provided copies of its limited liability company agreement and business plan, as well as the form of the subscription agreement that defines the obligation of the eight entities that are PFS members to contribute to the company. See NRC Staff's Response to [PFS] Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (Dec. 22, 1999) at 4-5 [hereinafter Staff Response]. According to the staff, based on its review of that information, in its December 15, 1999 site-related safety evaluation report (SER) for the PFS facility, the staff has proposed two license conditions that would provide:

> A. Construction of the [PFS] 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 [{ } MTU capacity]. 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.
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> B. 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.

Id. at 7 (quoting [SER] of the Site-Related Aspects of the [PFSF ISFSI] (Dec. 15, 1999) at 17-4; see also id. Affidavit of Alex F. McKeigney Concerning Utah Contention E (Financial Assurance) (Dec. 22, 1999) at 3 [hereinafter McKeigney Affidavit]. The staff concludes that these proposed conditions, along with the various other materials provided by PFS in response to the staff RAIs, are sufficient to establish that partial summary disposition should be granted in favor of PFS on contention Utah E/Confederated Tribes F because the contention's subparts, other than paragraph six regarding adequate cost estimates, either have been mooted or resolved.

In its December 27, 1999 response to the PFS motion and its January 10, 2000 reply to the staff's motion response, the State vigorously disagrees with PFS and the staff. In its response to the PFS motion, which is supported by the sworn declarations of Michael F. Sheehan, Ph.D., managing partner of the regulatory policy, economics, and finance consulting firm of Osterberg and Sheehan; Utah Department of Environmental Quality (DEQ) Radiation Control Division Director William J. Sinclair; and David A. Schlissel, president of the private consulting firm Schlissel Technical Consulting, Inc., the State declares initially that the

Commission's Claiborne decision is not controlling in this instance because 10 C.F.R. § 70.23(a)(5), which was the operative financial assurance regulatory provision for the LES enrichment facility, is completely different from 10 C.F.R. § 72.22(e) that requires a financial assurance finding relative to ISFSI facilities like that of PFS. According to the State, the language of section 72.22(e) is much more like that of 10 C.F.R. § 50.33(f), thus mandating that the more stringent requirements of 10 C.F.R. Part 50, App. C, be utilized. This is particularly so, the State maintains, given that (1) the PFS facility is significantly different from the LES operation in terms of its potential public health and safety and environmental impacts; (2) the NRC enforcement mechanisms cited by the Commission in support of its Claiborne decisions are likely not to provide an effective mechanism for ensuring that PFS will continue to be financially qualified throughout the term of its licensed activity; and (3) PFS has failed to provide a sophisticated financial plan that accounts for, among other things, its liability for losses and damages from onsite accidents or natural events. See [State] Response to the [PFS] Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes Contention F (Dec. 27, 1999) at 3-14 [hereinafter State Response]. Additionally,

the State asserts that the PFS commitments are so vague and ambiguous that PFS will be the sole arbiter of whether it meets the requirements of section 72.22(e), thus becoming the functional equivalent of a regulatory exemption that will both remove from public scrutiny any assessment of whether PFS ultimately meets those requirements and deprive the State of its right to a prior hearing on financial qualifications issues. See id. at 14-18. Finally, the State maintains that summary disposition is inappropriate because, as is noted in its attached statement of material facts in dispute, there are various unresolved factual questions that include the structure of the limited liability entity; whether the listed members of PFS will withdraw or have withdrawn from the company; the scope of the PFS commitments and how they will operate; and documentation of PFS funding sources and the term of such funding. See id. at 18-19.

In its reply to the staff's response, which also is supported by the affidavit of Dr. Sheehan, the State points out several additional problems that require the PFS summary disposition motion be denied. These include (1) the staff-proposed license conditions, like the PFS commitments, are vague, open-ended, and unenforceable, lacking compliance standards as well as any indication of who will determine

compliance; (2) staff reliance on those license conditions to fulfill the Part 72 financial qualifications requirements deprives the State of a meaningful hearing on that subject and constitutes the improper grant of a rule waiver to PFS; and (3) contrary to the staff's assertions, the Claiborne decision has no applicability to the PFS facility.[2] See [State] Reply to the Staff's Response to the [PFS] Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes F (Jan. 10, 2000) at 3-12 [hereinafter State Reply]. Additionally, the State declares that the staff lacks any record to support its position that PFS meets the financial qualifications requirements of Part 72 given the lack of experience and qualifications of its supporting witness, Mr. McKeigney. See id. at 12-14.

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[2] As we described in some detail in our February 4, 2000 issuance denying a January 19, 2000 staff motion to strike portions of the State's January 10, 2000 reply, in issuing its SER on December 15, 1999, the staff mistakenly used a draft version of SER chapter 17, the financial assurance chapter, that included proposed license conditions different from those described in the staff's December 22, 1999 response to the PFS dispositive motion. Although the staff subsequently sought to correct this error, the State sought to base part of its reply on this mistake, asserting, for instance, that this apparent misstep warranted further discovery to untangle conflicts in the staff's position. We concluded, however, because the State had assumed the two conditions proposed in the staff's response (as opposed to those in the SER) are the conditions that satisfy the staff's financial qualifications determinations, we could review its reply without gaining further clarification. See Licensing Board Memorandum and Order (Denying Motion to Strike Pleading) (Feb. 4, 2000) at 6 (unpublished).

Finally, the State maintains there are numerous material factual disputes, which include questions about (1) which versions of the PFS limited liability company agreement, business plan, and subscription agreements Mr. McKeigney reviewed in making his financial qualifications findings; (2) the lack of any mention of the effect of the sale of two PFS members' nuclear power plants on other PFS members and their equity contributions; (3) the marketability of the facility as it will effect safe operation; (4) the lack of any documentary material on PFS's current assets, liabilities, or capital structure; (5) what project costs should be considered in making a financial qualifications determination; (6) the supposed role of service agreements and the availability of Price Anderson Act "insurance" in allocating financial responsibility and covering nonroutine expenses; and (7) the impact on PFS operations of payment defaults by entities storing fuel at the PFS facility. See id. at 15-19.

D. State Request for Release of Proprietary Information

In its December 27, 1997 response to the PFS motion, citing what it characterizes as the efforts of PFS to "hide behind a veil of secrecy" relative to the nature and support for its financial qualifications commitments, the State requests that the PFS motion and all attachments other than

the PFS agreement be declared an "open public record." State Response at 13-14. Then, in the course of its January 10, 2000 reply to the staff's December 22, 1999 response to the PFS December 3, 1999 dispositive motion, the State describes how it was "amazed" to learn that certain documents publicly filed with its December 27, 1999 response to that PFS motion contained information regarding the PFS facility's minimum capacity that, although contained in the staff's proposed license condition, nonetheless is considered proprietary by PFS. State Reply at 19. Declaring that it "strongly objects" to keeping any portion of a proposed or final license condition nonpublic, the State urges the Board to release all claimed proprietary information relative to this summary disposition proceeding. Id. at 20.

The Board provided for party responses to this disclosure request, which PFS filed on January 28, 2000. In its response, PFS objects to this State request, asserting that the State has failed to make any showing that either the specific information on the facility's minimum initial capacity or any other information the State wants released is not proprietary under the controlling agency regulation, 10 C.F.R. § 2.790. See [PFS] Response to [State] Request for Release of [PFS] Proprietary Information (Jan. 28, 2000)

at 3, 6-7. Additionally, PFS declares that under established Commission caselaw, any resolution of this question should be deferred until after a resolution of the merits of this proceeding. See id. at 5, 8. In a pleading filed that same date, although deferring to the other parties' views on whether the minimum initial capacity figure was proprietary, the staff declared that the State had failed to make any showing to support its position that all claimed proprietary information should be disclosed. See NRC Staff's Response to [State] Request for Public Disclosure of Proprietary Information (Jan. 28, 2000) at 2.

II. ANALYSIS

A. Summary Disposition Standards

We recently have summarized the general standards governing our consideration of summary disposition requests as follows:

> Under 10 C.F.R. § 2.749(a), (d), summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material

> facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

LBP-99-23, 49 NRC 485, 491 (1999).

B. Application of Commission's Claiborne Decision to Contention Utah E/Confederated Tribes F

Although we must utilize these precepts as we consider the PFS partial summary disposition motion, from the PFS, staff, and State pleadings, it is apparent that a cardinal matter at issue is the effect of the Commission's 1997 Claiborne decision on the financial assurance controversy now before the Board. Accordingly, before moving to a consideration of the specifics of the PFS partial summary disposition request, we think it appropriate to address the overarching question of the impact of the Commission's Claiborne determination upon the financial assurance controversy in this proceeding.

Depending upon their position regarding the PFS motion, the parties seek either to have us find the Claiborne ruling controlling or declare it not apropos in the current circumstance because it concerned a 10 C.F.R. Part 70

uranium enrichment facility. And at the forefront of each of their arguments is a comparative parsing of the language of the financial qualifications provisions in 10 C.F.R. Parts 50, 70, and 72.

Section 72.22(e) states that an applicant for a license to construct and operate an ISFSI must provide information that shows it "either possesses the necessary funds, or that the applicant has reasonable assurance of obtaining the necessary funds or that by a combination of the two, the applicant will have the necessary funds" to cover estimated construction costs, estimated operating costs over the ISFSI's planned life, and estimated decommissioning costs. By way of comparison, section 50.33(f)(1) declares that a reactor construction permit applicant shall submit information that demonstrates it "possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs," while section 50.33(f)(2) directs that a reactor operating license applicant must submit information demonstrating that it "possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license." This, in turn, can be contrasted with section 70.23(a)(5), which states that the Commission must determine whether an

applicant for a license to construct and operate a uranium enrichment facility "appears to be financially qualified to engage in the proposed activities."

According to the State, the Commission's Claiborne approval of license conditions similar to those proposed by the staff for the PFS facility was based on the less exacting "appears to be financially qualified" criteria of section 70.23 and could never meet the section 72.22 standard that contains no "appears to be" qualifier. The State thus concludes that the "reasonable assurance" language of Part 72 requires that the PFS ISFSI facility be treated in accordance with the financial qualifications requirements that append to power reactor facilities under Part 50 rather than Part 70 uranium enrichment facilities, rendering inappropriate the reliance on license conditions like those utilized in Claiborne.

The Commission's analysis in Claiborne suggests, however, that the answer is otherwise. There, comparing the financial qualifications standards of Parts 50 and 70, the Commission noted that prior to 1968 the language in the two provisions was "essentially the same" and permitted considerable case-by-case flexibility relative to both regulatory schemes. CLI-97-15, 46 NRC at 300. Thereafter, in what the Commission described as regulatory action that

"had the effect of breaking any link that existed" between reactor and materials applicants, the agency adopted a rule change that added specific criteria and associated guidance (10 C.F.R. Part 50, App. C) for reactor license applicants. Id. at 301-02. As a consequence, the Commission concluded, notwithstanding similar early language, the 1968 rule change had the impact of making different, more stringent standards applicable for Part 50 licensees.

In this instance, the financial qualifications provisions of Parts 50 and 72 have some of the same general language, in terms of their requirements that "reasonable assurance" be found, but, as with Part 70, the specifics of each are very different. The information required under Part 72, which was first adopted in 1980 without any specific reference to the financial assurance requirements of Part 50, see 45 Fed. Reg. 74,693 (1980), is much less detailed than that demanded by Part 50.[3] This indicates to

[3] As the Commission noted in adopting Part 72 in 1980, ISFSI activities originally were licensed under Part 70. See 45 Fed. Reg. at 74,693. In contrast, however, to the 1968 rulemaking that the Commission found created a significant break between the financial assurance requirements of Parts 50 and 70, any difference between Parts 70 and 72 engendered by the adoption of a separate Part 72 is considerably less pronounced given that neither Part 70 nor Part 72 has the specific requirements of Part 50. In fact, the additional detail in Part 72 goes to the matter of costs, see 10 C.F.R. § 72.22(e)(1)-(3), which will continue to be the subject of litigation in this

(continued...)

us, as the Commission found in Claiborne, that there is no reason to apply the financial qualifications requirements of Part 50 in this Part 72 proceeding in toto, although there may be some parallels in appropriate circumstances. See LBP-98-7, 47 NRC at 187.

This, of course, brings us to the next concern posed by the State: whether a Part 72 financial qualifications finding of reasonable assurance can be based on a license provision that requires the applicant to meet certain fiscal requirements, the fulfillment of which are subject to post-license staff review, as a condition to beginning facility construction and operation. The State declares that, given the highly toxic radiological inventory of spent fuel, such a provision cannot meet the "reasonable assurance" standard of Part 72. Once again, however, the rationale posited by the Commission in Claiborne relative to the financial qualification requirements of Part 70 suggests this is not the case. In concluding there that the use of such a license condition was appropriate, the Commission noted, among other things, that the health and safety risks associated with a Part 70 gas centrifuge enrichment facility were less than those associated with Part 50 nuclear power

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[3](...continued)
proceeding under subpart six.

reactors, which have large radionuclide inventories and stored energy for dispersing such material. CLI-97-15, 46 NRC at 306 & n.18. Although the State asserts that the health and safety concerns involved with a Part 72 facility are more on a par with a power reactor than an enrichment facility, the Commission previously has indicated otherwise. In the statement of considerations supporting a 1995 rulemaking that revised Part 72 to permit the Director of the Office of Nuclear Materials Safety and Safeguards to issue a site-specific license for the storage of spent fuel at ISFSIs located at reactor sites, in responding to a comment that ISFSI licensing should be the same as for new reactors or other facilities, the Commission noted:

> The Commission agrees in part with the thrust of the comments, that is, that NRC regulations as applied should achieve a comparable level of protection for the public health and safety, whether the NRC-licensed activity is operation of a nuclear power reactor, storage of spent fuel in an ISFSI or a [monitored retrievable storage (MRS) facility], or disposal of high-level radioactive wastes in a geologic repository. Significantly, however, the goal of comparable protection does not mean ISFSI activities must be regulated by NRC's using the same NRC requirements as for reactors or geologic repositories.
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> Specifically, the public health and safety risks posed by ISFSI storage . . . are very different from the risks posed by the safe irradiation

of the fuel assemblies in a commercial nuclear reactor, which requires the adequate protection of the public factor in the conditions of high temperatures and pressures under which a reactor operates. The risks of ISFSI storage are also very different from those posed by the safe disposal of the irradiated fuel in a geologic repository, which would require isolation of the wastes from the accessible environment for thousands of years.

Nuclear fuel irradiated in a power reactor is highly radioactive and produces considerable heat. However, after the minimum 1 year of cooling that precedes its storage in an ISFSI, cooling and some shielding requirements will decrease as a result of the natural decay process over time. A fuel assembly cooled for 10 years after discharge from the reactor (typically the age of spent fuel actually placed in dry storage) generates approximately 500 watts of heat, which is on the order of the amount of heat generated by the light bulb in a floodlamp. In addition, its radiation dose rate is approximately one-half the rate when it was discharged from the reactor. ISFSIs are therefore designed to adequately dissipate the remaining heat, provide sufficient shielding from the radioactivity, and safely confine any gaseous and particulate radioactive nuclides.

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 eliminates the likelihood of accidents involving a major release of radioactivity from spent fuel stored in an ISFSI.

60 Fed. Reg. 20,879, 20,882-83 (1995) (citations omitted). Given this recent discussion indicating the hazards generally associated with an ISFSI are very different from those involved with a power reactor, it is not surprising that the Commission, in line with its holding in Claiborne, suggested to the parties and the Board that financial qualifications license conditions would be appropriate in the context of this Part 72 proceeding as well.[4]

By the same token, we find unconvincing the State's attempts, see State Response at 8-11, 16-17, State Reply at 10-12, to discount the Claiborne decision's reliance on the availability of staff post-licensing inspection and enforcement activities relative to applicant commitments or license conditions as a basis upon which to rest a finding of reasonable assurance relative to the PFS commitments and

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[4] We note that in this rulemaking, citing the lack of agency licensing experience, the Commission specifically declined to discontinue its practice of requiring direct Commission authorization for the licensing of an ISFSI, like the PFS facility, that is located at a site other than a reactor. See 60 Fed. Reg. at 20,883. While this choice further supports our determination here to refer our ruling to the Commission, we do not think it impacts on the broader question of the appropriate measures that are needed to assure a finding of adequate financial qualifications in a Part 72 proceeding.

corresponding proposed staff license conditions. The State cites various agency cases involving 10 C.F.R. Part 50 power reactor health and safety issues for the proposition that post-licensing resolution can only be utilized sparingly. See State Response at 16-17 (citing Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 952 (1974) and Public Service of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313 (1978)). In the context of financial assurance for nonpower reactor facilities, however, the Commission in Claiborne appears to have taken a broader view of the matter. See CLI-97-15, 47 NRC at 308 (agency's "inspection and enforcement tools provide further assurance" that the public health and safety would not be jeopardized); see also id. at 306-07 ("NRC inspections and enforcement action go a long way toward ensuring compliance with our requirements").

Finally, in light of the Commission's Claiborne decision, we do not find compelling the State's concerns that allowing the PFS commitments and the staff's proposed license conditions to provide the basis for a reasonable assurance finding is an improper waiver of the 10 C.F.R. Part 72 financial qualifications standards or an

undue infringement on the State's right to litigate material issues bearing on the PFS licensing decision.[5]

Accordingly, we decline to accept the State's attempt to have the use of financial qualifications-related PFS commitments and staff proposed license conditions declared unacceptable ab initio in the context of a Part 72 proceeding. As such, the question becomes whether the applicant commitments and the corresponding proposed license conditions are adequate to support summary disposition regarding the nine specific subparts of this contention that are at issue.[6]

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[5] In fact, the staff's ongoing inspection and enforcement responsibilities go a long way in addressing a principal State concern in this proceeding, i.e., the implications of reactor decommissioning either prior to sending fuel to the PFS site or during the PFS license term. Besides the staff's responsibility to oversee the financial qualifications of PFS as the receiver of the spent fuel, the agency already has an ongoing responsibility to ensure that reactor licensees involved in spent fuel storage arrangements have provided adequate funding for such arrangements until the Department of Energy takes title to and possession of the fuel for repository disposal. See 10 C.F.R. § 50.54(bb).

[6] In attempting to distinguish this proceeding from Claiborne, the State also relies on the fact that the Commission there relied, in part, on the fact that the applicant has "'developed a reasonably sophisticated financial plan.'" State Response at 11 (quoting Claiborne, CLI-97-15, 46 NRC at 307). The State then goes on to list various items, including contingent liabilities from accident damages, insurance coverage, and an insufficient funding stream due to expenses, as matters that have not been addressed in the PFS commitments so as to render them

(continued...)

C. PFS Summary Disposition Motion

Turning to the substance of the PFS motion for partial summary disposition, we deal with the overall validity of the license conditions proposed by the staff in its December 15, 1999 SER, as amended, which in all material respects conform to the commitments made by PFS, as well to each of the nine contention subparts that are at issue.[7]

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[6](...continued)
inadequate under Claiborne. See id. at 11-13. These, however, are all matters that relate to the sufficiency of various specific aspects of the PFS request for summary disposition, not a basis for refusing to entertain the motion in toto.

[7] There has been no challenge by PFS or the staff to the qualifications or expertise of the State's supporting declarants. As part of its challenge to the PFS and staff summary disposition filings, however, the State declares that the individuals utilized by PFS and staff as their principal declarants supporting the assertions in those parties' pleadings, PFS Chairman John Parkyn and staff financial analyst Alex F. McKeigney, are not qualified to provide this support, albeit for different reasons.

According to the State, Mr. Parkyn's affidavit is deficient because (1) there is no resolution by the Board of Managers binding PFS to such commitments; and (2) his attached resume is inadequate to establish that his experience or education is sufficient to support the various opinions about financial planning, marketing, and spent fuel storage economics that are made in his affidavit. See State Response at 19-20. On the first point, putting aside the fact that, as PFS Chairman, Mr. Parkyn does appear to have authority to make major commitments on behalf of PFS, see Parkyn Declaration exh. 2, at 22 (PFS company agreement section 702(d)(i) allowing PFS Chairman to "execute bonds, mortgages and other contracts on behalf of [PFS]"), the question of his authority becomes immaterial in light of the staff's proposed license conditions that would adopt the PFS
(continued...)

1. PFS Commitments/Staff Proposed License Conditions

Initially, we find unpersuasive the State's attempt to demonstrate that summary disposition is inappropriate because the PFS commitments, and the concomitant staff proposed license conditions are too vague and ambiguous to support a reasonable assurance finding. See State Response at 14-15; State Reply at 7-10. The principal State problems here are (1) the meaning of the term "construction" and the degree to which it incorporates the costs associated with bringing spent fuel shipments (either by constructing an

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[7](...continued)
commitments as part of the license. In connection with the second matter, while Mr. Parkyn's resume could be more descriptive in terms of the time frames within which he held his various positions, in light of his overall experience, nothing gives us cause to question his qualifications relative to the matters that are of pivotal concern here.

Relative to Mr. McKeigney, the State acknowledges that although he worked for some 21 years as a planner and financial analyst for the nuclear industry, Mr. McKeigney has been employed by the NRC as a financial analyst only since 1997, a period the State asserts is too brief to provide him with the experience to write license conditions or evaluate financial qualifications from the government perspective, including the utility of governmental functions such as post-licensing enforcement, which is referenced as a basis for the staff's conclusion that summary disposition is appropriate. See State Reply at 13. On the basis of the record before us, we find nothing to suggest that Mr. McKeigney lacks sufficient experience, either as a financial analyst or a government employee, to support the staff's conclusions. Indeed, we have noted previously, see supra pp. 29-30, the Commission itself has affirmed the adequacy of staff post-licensing inspection and enforcement efforts as support for financial assurance findings.

intermodal transfer point or a rail line spur) from the main rail line to the PFS facility; (2) whether the PFS operational commitment includes all operational, maintenance, and fixed costs; (3) funding sufficiency for additional storage commitments beyond the PFS initial operation target; and (4) the term of customer service agreements. The first two points, however, are matters that relate to the question of what are the PFS "costs" that its financial commitments must cover, which will be litigated relative to subpart six of this contention. So too, the State's concern about funding sufficiency determinations for additional storage commitments beyond the PFS target for initial operation is addressed by the staff's first proposed license condition, which requires such additional construction can commence only after adequate funding for such additional construction is fully committed. As to the question of the length of customer service agreements, although the State considers the staff's license condition reference to "long term" too vague, we are unable to agree given (1) the Commission's acceptance of that term in its Claiborne decision; and (2) the PFS commitment to obtain service agreements that cover operating and maintenance costs for the entire life of the PFS facility. See PFS Motion at 8.

The State's attempt to have us deny summary disposition on this basis thus is misplaced.

2. Subpart 1 -- Adequacy of PFS Ownership Information

a. PFS Position. PFS proffers two undisputed material facts, designated four and five, which (as is the case with the rest of the PFS material factual statements not in dispute) are supported by the affidavit of PFS Chairman Parkyn, in which it asserts that the owners of PFS have been identified to the staff and their relationships are explained in the PFS subscription agreement, which also has been provided to the staff. See PFS Motion, Statement of Material Facts on Which No Genuine Dispute Exists at 3 [hereinafter PFS Undisputed Material Facts]. As a consequence, PFS asserts this portion of the contention is moot. See PFS Motion at 10-11.

b. Staff Position. Based on the affidavit of Mr. McKeigney in which he states that PFS provided the names of the owners and adequate information on their relationships in responses to staff RAIs, the staff declares its agreement with the PFS position on subpart one. See Staff Response at 8; McKeigney Affidavit at 3.

c. State Position. In opposing the PFS motion, based on the affidavit of Mr. Schlissel, the State disputes both of the material facts relied upon by PFS. See State

Response, [State] Statement of Disputed and Relevant Material Fact at 10-11 [hereinafter State Disputed Material Facts]; id. exh. D, at 1-2 (declaration of David A. Schlissel); see also State Reply at 16. According to the State, two of the eight utilities that currently are PFS members either have, or are in the process of, selling their reactor units so as to no longer need spent fuel storage services. Additionally, the State contends that the relationship between the PFS members has not been adequately described in that the copy of the PFS limited liability agreement attached to the Parkyn affidavit as exhibit two does not include all the addenda and exhibits that are referenced in its table of contents, in particular exhibit A (Steps II and IV capital contributions), exhibit B (member subscription agreement form); exhibit C (interested utility subscription agreement form), and exhibit F (capital contributions).

d. Board Ruling. Although the State has framed certain factual disputes relative to this item, we conclude they do not preclude summary disposition because they are not material. Regarding the possibility that some of the original eight PFS members may drop out before construction, as we have noted above, the PFS commitments and the staff's proposed license conditions will not allow facility

construction to move forward unless sufficient funds, including equity contributions from PFS members, have been committed to the project. If it turns out at the time construction is to begin that, because of the number of PFS members available to make equity contributions there is a funding shortage, then PFS will not be able to begin construction. Indeed, the PFS membership agreement addresses this question by additional calls for equity contributions from remaining members and adding members to the PFS consortium. See Parkyn Declaration exh. 2, at 7-9 (PFS limited liability company agreement). Moreover, it is apparent from the discussion in the agreement regarding the agreement exhibits about which the State has expressed a concern, they are not material in that they would not provide any information that would impact on the efficacy of the PFS commitments or the proposed license conditions. Summary disposition in favor of PFS on this portion of contention Utah E/Confederated Tribes F is appropriate.

3. Subpart 2 -- Adequacy of PFS Financial Base

a. PFS Position. PFS again proffers two material facts not in dispute, designated six and seven, that it asserts provide a basis for summary disposition on this second portion of the contention. Essentially, PFS declares that the State's concerns about the adequacy of its

financial base are immaterial because it has obligated itself not to build without (1) sufficient committed funds to cover construction costs; and (2) in-place customer service agreements sufficient to cover facility operating and maintenance costs, including debt financing amortization. PFS also declares that the State's concerns about premature termination are groundless given that the company agreement keeps the company in existence until at least 2045 and can be extended by its members, the PFS commitments to ensure that the company will not begin construction and operation without the commitment of sufficient funds, and the fact the service agreements with customers will provide that PFS will remain in existence to provide agreed upon spent fuel storage services, thus precluding voluntary termination of PFS before its regulatory and licensing obligations are completed and its Part 72 license is terminated See PFS Motion at 11-12; PFS Undisputed Material Facts at 3-4; Parkyn Declaration at 5-6.

b. Staff Position. The staff again agrees with the PFS position, pointing out that the applicant entity in Claiborne also was a newly formed entity with no executed contractual commitments from its project partners or lender funding, yet the Commission found license conditions like

those proposed here to be sufficient to ensure the requisite reasonable assurance. See Staff Response at 8-12; McKeigney Affidavit at 3.

c. State Position. Relying on the affidavit of Dr. Sheehan, the State disputes material facts six and seven, declaring that the PFS commitment does not show that its financial basis is sufficient to assume ownership and operation obligations for the facility or that the commitments address amortization of any debt financing. In addition, the State declares there is no assurance that PFS will not be subject to termination before the expiration of its Part 72 license or the removal of all the casks from Skull Valley. The State notes that under the PFS agreement, PFS may be terminated at any time by the consent of those members with a "Class A Percentage Interest," a class defined in exhibit A to the agreement that has not been put before the Board; that, depending on the date of licensing, the 2045 termination date may not be sufficient to cover the PFS twenty-year term plus one twenty-year renewal; that members can withdraw at any time; and that a statement by Mr. Parkyn that customer service agreements will require PFS to remain in existence to provide any agreed fuel storage services is meaningless because the service agreements have not been provided for the record. See State Response, State

Disputed Material Facts at 11-13; id. exh. A at 2-3, 9-10, 12 (Declaration of Michael Sheehan) [hereinafter Sheehan Declaration]; State Reply at 17-18.

d. Board Ruling. As we have noted earlier, in line with the Commission's Claiborne decision, reasonable assurance is provided by the PFS commitment and the staff proposed license conditions requiring that PFS must have adequate financial resources, including debt financing amortization, in place for construction and operation prior to beginning those activities. On the issue of the continuing existence of PFS, we find (as did the staff) the PFS commitment to include a provision in the customer service agreements that will obligate it to continue to provide spent fuel storage services until license termination is sufficient to provide the requisite reasonable assurance. Moreover, as with the Commission's Claiborne decision, in which there likewise were no contract agreements with prospective customers, see CLI-97-15, 47 NRC at 304, we do not find lack of any existing "draft" agreements is material to the requisite reasonable assurance finding. Compare also Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1106-07 (1983) (implementing details should not become the focus of litigation over the adequacy of power

reactor emergency plans). We thus find summary disposition in favor of PFS appropriate as to this portion of the contention as well.

4. Subpart 3 -- Adequacy of PFS Funding Documentation, including Business Plan and Subscription Agreements

a. PFS Position. The two material factual statements not in dispute set forth by PFS in support of summary disposition on this subpart, numbered eight and nine, state that (1) its financial assurance flows from the PFS commitments not to commence facility construction until there is a sufficient funding commitment to do so and to commence facility operation only after service agreements are in place fully to cover the costs of facility maintenance and operation; and (2) PFS will have no liabilities other than providing spent fuel storage and related services to customers for which it will be paid under the service agreements. See PFS Undisputed Material Facts at 4; id. Parkyn Declaration at 6-7. As a consequence, PFS declares this subpart is moot because, based on its commitments, it has done all it needs to do to demonstrate financial assurance, thereby alleviating it from any obligation to further document its funding sources. See PFS Motion at 12-13.

b. Staff Position. Relying on the affidavit of Mr. McKeigney, the staff declares that the PFS commitments, as reflected in the staff's proposed license conditions, in conjunction with the staff's inspection verification activities, that include confirmation that subscription and service agreements have been executed, establish that there are no material disputed facts relative to this subpart as well. Although expressing its disagreement with the assertion in PFS undisputed material facts statement number nine that PFS will have no liabilities on the basis that PFS may incur some commercial bank or other third party lender liability relative to its construction of the facility, the staff nonetheless concludes that the PFS commitments, as incorporated in the staff proposed license conditions, establish that such liability would not interfere with the debt repayment or facility construction or operation ability of PFS and thus fail to provide grounds for not granting summary disposition to PFS regarding this subpart. See Staff Response at 12-13 & n.6; id. McKeigney Affidavit at 4.

c. State Position. Regarding PFS undisputed material fact statement numbers eight and nine, citing the affidavit of Dr. Sheehan, the State declares that it has not been provided with a copy of the PFS members' subscription agreements or of the service agreements and, accordingly,

there is no evidence whether, as PFS asserts, these agreements will be adequate to provide reasonable assurance that they provide sufficient funding commitments. See State Disputed Material Facts at 13-14; Sheehan Declaration at 8, 10, 12.

d. Board Ruling. As was the case in Claiborne, we find the PFS commitment, as reflected in the proposed staff license conditions, to have member subscription agreements and customer service agreements in place that are sufficient to cover the costs of construction and operation prior to beginning those activities provide the requisite reasonable assurance and make summary disposition appropriate relative to this portion of this contention.[8] Moreover, under the

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[8] In its December 15, 1999 statement of position regarding this contention, the staff notes that

> because PFS has not provided copies of each member's executed Subscription Agreement, and because PFS has provided neither blank forms of Service Agreements nor copies of any executed Service Agreements, the staff has concluded that the documents supplied to date are insufficient to support reasonable assurance that PFS is financially qualified to construct, operate, and decommission the proposed facility pursuant to 10 C.F.R. § 72.22(e). The Staff considers that this issue will be resolved upon PFS' compliance with the Staff's recommended license conditions, supported by adequate documentation, before

(continued...)

terms of the PFS commitments and the staff's proposed license conditions, the most significant aspect of the PFS business plan relative to the ability of PFS to undertake facility construction and operation -- the costs of facility construction and operation -- will be subject to litigation under basis six of this contention.[9]

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[8](...continued)
construction is allowed to commence.

NRC Staff's Statement of Its Position Concerning Group I-II Contentions (Dec. 15, 1999) attach. at 4. As we read the Commission's Claiborne determination, such a finding is permissible in the context of a non-Part 50 financial qualifications review and dispositive of the PFS concern here.

[9] In its Claiborne decision, the Commission noted that, relative to the issue of whether financial difficulties might lead to construction safety problems, in addition to the applicant's advance funding commitment, the Commission's reasonable assurance finding was based on the applicant's construction cost estimate, which had been established as "reasonable." CLI-97-15, 46 NRC at 307. According to the Commission, the solidness of the applicant's cost estimate indicated it understood its funding commitment, had seriously considered the factors that would contribute to project expenses, and was in a position to recognize promptly any unforseen cost escalation difficulties, thereby allowing it time to maintain its financial qualifications. See id. Recognizing that the "reasonableness" of the PFS cost estimate is still at issue relative to subpart six of this contention, this nonetheless does not preclude us from granting summary disposition relative to this and other portions of contention Utah E/Confederated Tribes F. Rather, it serves to emphasize the importance of the cost issue. Consistent with Claiborne, in the face of a record establishing that construction or other costs are significantly beyond PFS estimates, a final determination of PFS compliance with the reasonable assurance requirement of section 72.22(a) could be problematic without some
(continued...)

5. Subpart 4 -- Adequacy of PFS Documentation on Current Financial Status

a. PFS Position. Relying again upon undisputed material factual statements eight and nine, PFS declares that this subpart's claim that PFS must provide a current assets, liabilities, and capital structure statement to establish financial assurance is without merit in light of the PFS commitments, the nonapplicability of the 10 C.F.R. Part 50 financial assurance requirements, and the description of its capital structure in its agreement and its pro forma subscription agreements provided to the staff. In addition, according to PFS, this basis is without substance given that PFS will have no liabilities other than providing spent fuel storage and related services to customers, for which it will be paid under the service agreements, and has a capital structure that would not adversely affect the financial assurance it has established through its commitments. See PFS Motion at 13; PFS Undisputed Material Facts at 4; Parkyn Declaration at 6-7.

b. Staff Position. The staff likewise finds summary disposition appropriate for this subpart, declaring that a current PFS statement of assets, liabilities, and capital

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[9](...continued)
additional showing by PFS regarding its understanding of the scope of project expenses and its funding commitment.

structure is irrelevant given that, consistent with the PFS commitments and the proposed license condition, PFS need not and will not have any significant financial assets or liabilities until after a license is granted. See Staff Response at 13; McKeigney Affidavit at 4-5.

c. State Position. Again based on Dr. Sheehan's affidavit, the State declares there is a dispute regarding PFS material factual statement number nine in that PFS may have significant liabilities that will impair funding of construction, operation, maintenance, decommissioning, and transportation services. See State Disputed Material Facts at 13-14; Sheehan Declaration at 7-8.

d. Board Ruling. Once more, consistent with the Commission's Claiborne ruling, we find summary disposition in favor of PFS appropriate relative to this portion of Contention Utah E/Confederated Tribes F. The premise of the various liability concerns posed by the State is that PFS will be permitted either to construct or operate the facility when there is an inadequate revenue stream to cover the costs reasonably involved in such activities, a premise we find is inconsistent with the PFS commitments and the staff proposed license conditions. Further, we note that to the extent the State, in the context of this subpart (as opposed to subparts five and ten), now seeks to incorporate

"liabilities" relating to contingent matters such as accident or natural event losses, the State is requesting information that falls outside the scope of 10 C.F.R. Part 50, App. C, § II.A.2 (requiring applicant statement of "assets, liabilities, and capital structure as of the date of the application") that it references as support for this portion of its contention.

6. Subpart 5 -- PFS Liability for Spent Fuel Casks

a. PFS Position. Referencing undisputed material factual statements ten and eleven, PFS asserts that summary disposition is appropriate for this claim because (1) as the Commission noted in the Claiborne case, the NRC licensing process will ensure that the PFS facility is a safe site such that there will not be an allocation of accident recovery to PFS that would cause a funding shortfall; and (2) notwithstanding the fact that, unlike the reactor financial assurance provisions, see 10 C.F.R. § 50.54(w), there is no requirement for Part 72 licensees to have accident recovery onsite property insurance, PFS will have insurance sufficient to cover the costs of accident remediation that is greater than the amount of insurance coverage the Commission has proposed is necessary for spent fuel kept at an onsite reactor ISFSI (citing 62 Fed. Reg. 58,690, 58,691-92 (1997)), albeit to cover mobile

radioactive sources, not the onsite spent fuel storage. See PFS Motion at 14-15 & n.11; PFS Undisputed Material Facts at 4; Parkyn Declaration at 7-8.

b. Staff Position. Agreeing that a 10 C.F.R. Part 72 licensee is not required to carry onsite property insurance, the staff also concludes summary disposition is appropriate in connection with this subpart because (1) PFS has indicated in its licensing submittals that customers must retain title to their own fuel during storage; and (2) PFS has stated the service agreements assigning the terms of legal and financial responsibility among the customers, as owners of the fuel, and PFS, as the facility owner, and those agreements will be subject to staff inspection verification. See Staff Response at 14-15; McKeigney Affidavit at 5-6.

c. State Position. The State disputes material fact numbers ten and eleven, asserting, based on the affidavit of Utah DEQ Director Sinclair, that the circumstances at the Atlas Corporation Moab, Utah uranium mill tailings site establish that staff deferral of financial assurance decisions results in public health and safety impacts. See State Disputed Material Facts at 14; State Response, exh. B at 1-3 (declaration of William J. Sinclair). Also establishing disputed material facts, the State contends, is

the fact that PFS has no assets of its own and no deep pockets to ensure responsibility for accident recovery or funding shortfalls; has not produced any onsite or offsite insurance policies and has failed to commit to obtaining such policies; has failed to show that the policies it "contemplates" retaining are adequate to cover an ISFSI at which 40,000 MTUs of spent nuclear fuel will be stored; and has not even provided the staff with the service agreements that purportedly will contain language that assigns the terms of legal and financial responsibility among customers. See State Disputed Materials Facts at 14-15; Sheehan Declaration at 4-5, 8-9, 12-13; State Reply at 18.

d. Board Ruling. In granting summary disposition in favor of PFS on this portion of contention Utah E/Confederated Tribes F, in conjunction with the Commission's Claiborne endorsement of staff post-licensing inspection and enforcement activities as ensuring financial qualification, we take notice of the PFS commitments that it will (1) offer storage services only on the condition that each customer retain title to its fuel throughout the storage period; and (2) include in each customer service agreement an assignment of legal and financial responsibility among the customers, as owners of the spent fuel, and PFS. With regard to the latter, we note that

while PFS has not provided any specifics on what this assignment will be, consistent with the Commission's Claiborne decision, its commitment to include this allocation in the service is sufficient to render this concern moot.

To the degree this subpart involves the issue of the adequacy of PFS liability insurance arrangements, for the reasons we detail in addressing subpart ten below, see section II.C.10.d below, we grant summary disposition in favor of PFS relative to the offsite liability question and deny its motion as to the matter of onsite liability.

7. Subpart 7 -- Adequacy of Existing Market Documentation

a. PFS Position. Relative to the claim in this subpart that PFS must document the existing market for spent fuel storage services and service agreement commitments to establish sufficient construction funding, PFS declares it moot because of its commitment not to build without sufficient funding and not to operate without sufficient service agreements to cover the full cost of facility operation and maintenance, including debt financing amortization. Further, as this subpart seeks to question the sufficiency of the PFS initial MTU funding designation as adequate to cover operation, decommissioning, and contingencies, in addition to declaring the figure put forth

by the State to be irrelevant because this is not the figure PFS intends to use, PFS also declares that the State's challenge, as it relates to contingencies and decommissioning, is really a challenge to the adequacy of the PFS cost estimate and decommissioning funding, which are matters for consideration under subpart six of this contention or contention Utah S, Decommissioning, both of which are not the subject of this summary disposition motion. See PFS Motion at 15-16 & n.12; PFS Undisputed Material Facts at 4 (undisputed material fact statement number twelve); Parkyn Declaration at 9.

b. Staff Position. The staff declares its proposed license conditions render this portion of the contention moot, given that they provide construction cannot start without fully committed construction funding sufficient for a facility with the initial capacity specified by PFS, making a documented spent fuel storage market unnecessary. The staff also agrees with the PFS position that the claims regarding the adequacy of the PFS initial capacity figure to cover contingencies and decommissioning are subject to consideration under subpart six of Utah E/Confederated Tribes F concerning PFS cost estimates and Utah S regarding decommissioning. See Staff Response at 15-16 & n.7; McKeigney Affidavit at 6.

c. State Position. The State asserts a dispute with PFS material factual statement number twelve on the basis that, because PFS has no assets of its own, PFS must demonstrate it has an adequate market to generate an income stream from service agreements. See State Disputed Material Facts at 15; Sheehan Declaration at 12; State Reply at 16-17.

d. Board Ruling. As we have indicated previously, the PFS commitments and the staff proposed license conditions do not permit construction or operation unless PFS is able to obtain funding commitments sufficient to cover these activities. As a consequence, relative to this facility, the question of the existence and adequacy of the market for spent fuel storage services is not material to the requisite reasonable assurance finding under 10 C.F.R. § 72.22(e). Accordingly, we grant summary disposition in favor of PFS on this portion of the contention. Moreover, as both PFS and the staff suggest, any question about the adequacy of the PFS initial capacity figure to cover contingencies and decommissioning is subject to consideration under subpart six to contention Utah E/Confederated Tribes F concerning PFS cost estimates and contention Utah S regarding decommissioning.

8. Subpart 8 -- Propriety of PFS Use of Debt Financing

a. PFS Position. Also rendered moot by the PFS financial commitments, according to PFS, is this subpart declaring that debt financing is not a viable option for construction funding until supporting documentation, including service agreements, is provided and a minimum value of service agreements is committed. PFS declares that, as with the Claiborne case, its commitment not to commence construction until it has committed funds in place makes the source of funds, whether debt financing or otherwise, irrelevant to its financial qualifications. See PFS Motion at 16-17; PFS Undisputed Material Facts at 4 (undisputed material fact statement number thirteen); Parkyn Declaration at 9.

b. Staff Position. The staff likewise finds this contention subpart moot, declaring that PFS may not need to incur debt to finance construction costs and, in any event, because of the staff's proposed license conditions requiring it to have funding commitments before construction begins, PFS would have an adequate basis to attract debt financing and to repay any debt and associated interest expense. See Staff Response at 16; McKeigney Affidavit at 6.

c. State Position. The State declares PFS material factual statement thirteen is in dispute because PFS has

offered no support for its claim that the PFS commitment will raise sufficient revenue, including debt financing, to begin construction and the use of debt financing could burden PFS with such construction debt that there would not be sufficient revenues to cover both the debt and operation and maintenance costs. See State Disputed Material Facts at 16; Sheehan Declaration at 4, 7.

d. Board Ruling. As with subpart four, this stream of revenue concern relating to debt amortization is rendered moot by the PFS commitments and staff proposed license conditions, which require that before it can begin construction or operation, PFS must have the committed funds that are necessary to undertake that activity, including funding that will cover any debt financing that it must undertake. Accordingly, summary disposition in favor of PFS on this portion of the contention is appropriate as well.

9. Subpart 9 -- Adequacy of PFS Measures to Address Service Agreement Breach

a. PFS Position. Relative to this State concern about the impact if storage clients stop payments to PFS because of client insolvency or unresolved disputes with PFS, PFS declares this shortfall concern should be resolved in its favor because (1) before shipping fuel to the PFS facility, PFS customers, including PFS members, will be required to make most of their payments to PFS, i.e., a three-part base

storage payment, that will cover costs of facility construction, spent fuel canister and cask manufacture, spent fuel preparation equipment, transportation, and PFS general and overhead expenses;[10] and (2) PFS periodically will evaluate customer financial health to ensure fee payment, using financial information required to be provided by customers under each service agreement, will require customers to meet creditworthiness requirements, and has available a variety of methods, such as advance payments, irrevocable letters of credit, third-party guarantees, and payment and performance bonds, to ensure there will be customer payments sufficient to adequately fund the facility. See PFS Motion at 17-18; see PFS Undisputed Material Facts at 5 (undisputed material factual statement number fourteen); Parkyn Declaration at 9-10.

b. Staff Position. The staff finds no material facts in dispute because (1) it is expected that in the normal course of any business entity's operation, some customers will make insufficient payments, which can be addressed with

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[10] In his affidavit accompanying the PFS motion, PFS Chairman Parkyn indicates that for a facility of the initial design capacity now being proposed by PFS, the prepaid base storage fees would "conservatively" cover 75 percent of the total amount to be received by PFS for storage services over the 20-year initial life of the facility, with annual storage fees intended to cover operating and maintenance costs providing the balance. See Parkyn Declaration at 4, 10.

standard legal remedies; and (2) PFS has stated it will collect most of a customer's storage payment in advance before fuel will be stored at the facility. See Staff Response at 17; McKeigney Affidavit at 6-7.

c. State Position. PFS material factual statement number fourteen is in dispute, the State asserts, because there are no service agreements in evidence; annual storage fees are paid annually, not prior to receipt of the fuel; there is no payment scheme for reactors that plan to decommission before the end of the potential forty-year license period for PFS and so will not be available to pay annual storage fees; spent fuel cannot be returned to decommissioned sites in the event storage fees are not paid; and PFS has failed to account for uncollectible accounts. See State Disputed Material Facts at 16; Sheehan Declaration at 11-12. Additionally, the State declares that the staff's analysis relating to this subpart is inadequate because there is no evidence that up front payments will be made to PFS prior to fuel shipments or that inservice debt will be irrelevant; the staff is improperly deferring to the applicant's evaluation of customer financial health and has no reason to believe the service agreements will require customers to provide financial information; and the staff's

reliance on standard legal remedies does not comport with reality. See State Reply at 18-19 & n.10.

d. Board Ruling. Consistent with the Commission's Claiborne determination, the PFS requirement for substantial base storage payments and its commitment to require in the service agreements that customers (1) periodically provide pertinent financial information; (2) meet creditworthiness requirements; and (3) provide any necessary additional financial assurances (e.g., an advance payment, irrevocable letters of credit, third-party guarantee, or payment and performance bond) provides the requisite reasonable assurance such that summary disposition in its favor is appropriate on this portion of the contention. As we have indicated, service agreements bearing these provisions need not be in place to provide the requisite reasonable assurance, given that those agreements will be subject to staff verification as part of the inspection process relating to PFS and the staff's independent financial assurance review responsibilities relative to PFS customers' irradiated fuel management and funding programs. See 10 C.F.R. § 50.54(bb).

10. Subpart 10 -- Adequacy of PFS Resources for Non-Routine Expenses

a. PFS Position. Referring again to undisputed material factual statements ten and eleven, PFS maintains

summary disposition in its favor is appropriate on this portion of contention Utah E/Confederated Tribes F regarding the adequacy of PFS resources to cover worst case spent fuel transportation, storage, or disposal accidents because (1) offsite transportation accident recovery is governed by 10 C.F.R. Part 71 and United States Department of Transportation regulations; (2) spent fuel transportation accident cost recovery would be covered under the Price-Anderson Act, 42 U.S.C. § 2210, see also 42 U.S.C. § 2014(t), (ff); 10 C.F.R. § 140.91, app. A, art. III (definition of "insured shipment"), which makes reactor licensees or the United States Department of Energy (DOE) responsible; (3) under the standard spent fuel disposal contract between DOE and nuclear utilities, spent fuel disposal costs, including transportation and attendant accident recovery costs, are the responsibility of DOE; (4) NRC technical review, inspection, and enforcement activities makes the possibility of significant accidents at the PFS facility a very low probability, as reflected in the fact that there are no NRC onsite or offsite liability insurance requirements for ISFSIs like the PFS facility; and (5) PFS will have onsite nuclear property insurance and offsite nuclear liability insurance sufficient to cover cost recovery for any foreseeable accident at the PFS facility.

See PFS Motion at 18-20; PFS Undisputed Material Facts at 4; Parkyn Declaration at 7-8.

b. Staff Position. In supporting the PFS request for summary disposition on this contention basis, the staff declares that (1) PFS is correct that spent fuel transportation safety issues are outside the scope of this proceeding; (2) transportation accident liability is addressed under the Price-Anderson Act provisions of the Atomic Energy Act (AEA) and implementing NRC regulations, which would include coverage under specific 10 C.F.R. Part 50 power reactor licensee policies during spent fuel transportation and coverage for DOE contractors who might transport spent fuel from the PFS facility to a DOE repository; and (3) the PFS plan to obtain the largest commercial nuclear liability insurance policy available, in the amount of $200 million, as well as property insurance in the amount of $70 million, is sufficient contingency funding coverage. See Staff Response at 18-20; McKeigney Affidavit at 7. In doing so, however, staff affiant McKeigney states his disagreement with the statement in PFS undisputed material factual statement number eleven that PFS onsite and offsite nuclear liability insurance coverage will meet or exceed any requirement for ISFSIs, noting that there are no such NRC requirements and an ongoing NRC financial assurance

rulemaking regarding spent fuel storage concerns only permanently shutdown reactor licensees, not offsite ISFSIs. See McKeigney Affidavit at 7-8.

c. State Position. The State disputes material fact numbers ten and eleven, declaring that PFS has no assets of its own and no deep pockets to ensure responsibility for accident recovery or funding shortfalls; has not produced any onsite or offsite insurance policies and has failed to commit to obtaining such policies; and has failed to show that the policies it "contemplates" retaining are adequate to cover an ISFSI at which 40,000 MTUs of spent nuclear fuel will be stored. See State Disputed Material Facts at 14-15; Sheehan Declaration at 4-5, 8-9, 12-13. In addition, the State contests the PFS motion because there is no license condition requiring PFS to carry any amount of insurance and because of its belief that the Price-Anderson Act may not cover spent fuel coming from a Part 72 facility or from the PFS facility to a non-DOE facility. See State Reply at 18; id. exh. 1, at 3 (supplemental declaration of Michael Sheehan).

d. Board Ruling. As this portion of contention Utah E/Confederated Tribes F concerning the financial ability of PFS to deal with worst case accidents relates to transportation incidents, we find summary disposition in

favor of PFS is appropriate. Putting aside our previous rulings regarding the scope of this proceeding relative to transportation issues, it is apparent that in all material respects, transportation-related incidents will be covered under the provisions of the Price-Anderson Act, AEA § 170, 42 U.S.C. § 2210, and regulatory implementing provisions, including 10 C.F.R. Part 140. Although the State raises questions about Price-Anderson Act coverage relative to spent fuel transfers between Part 72 ISFSI facilities (of which the PFS facility is the only one currently the subject of the agency's licensing process) or shipment from PFS to a non-DOE, non-Part 50 facility, it has not shown that such shipments are in any way contemplated or likely.

In connection with the question of PFS financial assurance relative to onsite or offsite liability from worst case incidents, we find that summary disposition is appropriate in favor of PFS relative to the offsite liability issue.[11] Utilizing its discretionary authority,

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[11] Initially, PFS suggests that this matter and the related concern in subpart five are subject to summary disposition because the agency's licensing findings, by their very nature, ensure a facility that will operate in a manner that will have no onsite or offsite worst case accident-related consequences. It is apparent, however, that this assertion is not dispositive in connection with financial protection analysis. See 62 Fed. Reg. 58,690, 58,691 (1997) (in determining appropriate liability limitations for permanently shutdown power reactors, staff

(continued...)

NRC could require PFS to provide Price-Anderson Act financial protection, with its concomitant liability limitations. See AEA § 170a, 42 U.S.C. § 2210(a). As PFS and the staff have pointed out, however, at this juncture the agency has decided not to invoke its discretionary authority relative to Part 72 ISFSIs. Compare 43 Fed. Reg. 46,309, 46,310 (1978) (Part 72 proposed rule statement of considerations indicating Commission is considering whether to exercise Price-Anderson Act discretionary authority to prescribe financial protection requirements) and ICF Inc., The Price-Anderson Act -- Crossing the Bridge to the Next Century: A Report to Congress, NUREG/CR-6617, at 5 (Oct. 1998) (contractor report prepared for NRC Office of Nuclear Reactor Regulation) (after 1997, NRC evaluated whether to invoke Price-Anderson Act discretionary authority relative to material licensees and decided no apparent need existed) [hereinafter NUREG/CR-6617] with 62 Fed. Reg. 58,690, 58,690-91 (1997) (Parts 50/140 proposed rule statement of considerations regarding onsite and offsite liability coverage for permanently shutdown power reactors indicating the subject of ISFSI financial protection requirements will be addressed after technical and licensing

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[11](...continued)
analyzes beyond design basis accidents relating to spent fuel storage).

issue efforts regarding safeguards requirements, emergency planning, and potential fuel storage handling activities). As a practical matter, the PFS facility thus falls into the same category as the Claiborne enrichment facility that also was not under the Price-Anderson Act umbrella, albeit as a matter of congressional direction. See AEA § 193(e), 42 U.S.C. § 2243(e).

As a consequence, we think the Commission's direction in the Claiborne proceeding regarding the scope of the applicant's financial protection requirements provides a useful template for addressing that question here. In Claiborne, in the notice of opportunity for hearing on the Part 70 enrichment facility application, after noting that its Part 140 provisions in (1) sections 140.15-.17 provide adequate guidance regarding proof of financial protection (insurance); and (2) Appendix A provide the models for the form, content, and coverage of nuclear energy liability insurance, the Commission went on to observe:

> As to amount, the applicant shall, in the first instance, justify the amount of insurance it intends to purchase, in terms of a reasonable evaluation of the risks required to be covered by the legislation, but in no case need the applicant provide an amount greater than the maximum amount available from commercial nuclear energy liability insurers.

56 Fed. Reg. 23,310, 23,312 (1991). As a consequence, notwithstanding that the Price-Anderson Act liability limitation was not applicable, the Commission required that the applicant obtain no more than the maximum amount of nuclear liability insurance currently commercially available.

In this instance, relative to its offsite liability, PFS has committed to obtain a nuclear energy liability insurance policy in the amount of $200 million. Because this is currently the largest commercially available policy, see NUREG/CR-6617, at 76 ($200 million largest nuclear liability insurance policy currently available); see also Staff Response, McKeigney Affidavit at 7 (PFS has stated it will obtain largest commercial nuclear liability insurance policy available in the amount of $200 million), in accordance with the Commission's Claiborne guidance, we find this commitment sufficient to merit summary disposition in favor of PFS on this point.

As to the question of onsite property coverage, however, the matter is not so clear. PFS has committed to providing insurance in the amount of $70 million, which it describes (and the staff agrees) is adequate. We are aware of nothing, however, that would establish that, as is the case with its offsite liability insurance commitment, this

amount is the largest commercially available coverage. See also 10 C.F.R. § 50.54(w)(1) (minimum reactor facility onsite insurance must be lesser of $1.06 billion or amount of insurance generally available from private sources). Consequently, in light of the State's unrebutted assertions regarding a lack of any particularized showing concerning the coverage that is necessary for the PFS facility, and the apparent lack of conformance with the Commission's Claiborne guidance regarding liability insurance, there appears to be a material factual issue in dispute relative to PFS onsite liability coverage that precludes entry of summary disposition relative to this aspect of the contention. We thus deny the motion on this point.

D. Joint Report on Further Litigation Regarding Contention Utah E/Confederated Tribes F

With this summary disposition ruling, as well as our additional discovery and late-filed contentions rulings made today, see LBP-00-07, 51 NRC __ (Mar. 10, 2000); Licensing Board Memorandum and Order (Ruling on Discovery Requests) (Mar. 10, 2000) (unpublished), it appears that paragraph six of this contention relating to the PFS costs estimates for construction and operation and the size of the PFS onsite liability under paragraphs five and ten are the only issues for further litigation under this contention. Accordingly, the Board requests that on or before Friday, March 17, 2000,

the parties provide the Board with a joint report indicating what portion of the scheduled June 1999 hearing time needs to be devoted to litigation of these issues. Additionally, the parties should indicate what portion, if any, of the proceeding on this contention will need to be closed because it will involve the discussion of proprietary information. Also in this report, the parties should provide information on the status of the cask application relating the Utah GG, Failure to Demonstrate Cask-Pad Stability During Seismic Event for TranStor Casks.

If the parties believe that a telephone conference with the Board regarding this scheduling matter would be useful as well, they should provide the Board with two or three alternative times that the parties will be available during the week of March 20, 2000.

E. State Request Regarding Release of Propriety Information

As we described in section I.D. above, in its December 27, 1999 response to the PFS December 3, 1999 motion and again in its January 10, 2000 reply to the staff's December 22, 1999 response in support of that motion, the State has requested that various documents that are now being treated as proprietary, and therefore not subject to public release, be placed in the public docket of this proceeding. Specifically, the State has asked for

public release of (1) the PFS motion and all attachments except, perhaps, the portions of the PFS limited liability agreement included as exhibit two to Mr. Parkyn's affidavit be made part of the public docket of this proceeding; and (2) all information relating to the PFS December 3, 1999 summary disposition motion claimed to be propriety. Putting aside the problem that, with perhaps the exception of its designation of the PFS figure for its nominal storage target and a reference to "legal arguments," the State has not specifically identified any information it believes is being wrongfully withheld, our review of the circumstances surrounding this request reinforces our original judgment that the resolution of such questions is better deferred.

In this regard, we note initially both protected safeguards and proprietary information have been implicated in connection with several of the contentions to this proceeding. As a consequence, the Board has attempted to take a practical approach that directs the immediate resources of the Board and the parties who need access to this protected information to resolving the merits of the issues concerning that protected information rather than attempting to reach a definitive resolution about the nature of the information. Thus, the Board's protective orders regarding this protected information do not mandate

separate, redacted copies of pleadings containing purported protected information; instead, a party filing a pleading in which protected information may be implicated only is required to place in the public docket and serve upon other parties to the proceeding not concerned with the contention involving that information a letter or some other form of notice that a pleading has been filed in which protected information may be implicated. See Licensing Board Order (Granting Leave to File Response to Contentions and Schedule for Responses to Late-Filed Contentions) (Dec. 31, 1997) at 2 (unpublished) (proprietary information); Licensing Board Memorandum and Order (Protective Order and Schedule for Filing Security Plan Contentions) (Dec. 17, 1997) at 9 (unpublished) (safeguards information). The Board contemplated that, with this record, the Board and any of the parties would be in a position to resolve any disputes over the nature of the protected information when a merits resolution had been reached relative to the issues in this proceeding. See Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 (1982). Moreover, as with this memorandum and order, the Board has attempted to limit its use of protected information so that its issuances, to the greatest extent possible, can be placed in the public record of the proceeding.

In its attempt to have the Board abandon this construct, the State has illustrated the very problems the Board has sought to avoid. In responding to the PFS motion that was labeled as containing proprietary information and contained an affidavit from PFS Chairman Parkyn supporting that designation, the State sought to file a sanitized response. As it turned out, however, the State's response contained references to the current PFS nominal storage target figure and several dollar figures in exhibit D to the motion that PFS considers proprietary. When PFS informed the State of its concerns, the State then had to ask for the return or destruction of all served copies. Thereafter, it provided another redacted version for the agency docket and to those to whom it had given its original response that included the PFS-designated proprietary information.

As the myriad current filings relating to contention Utah E/Confederated Tribes illustrate, the parties and the Board are very busy litigating the merits of this case. The State, as the lead intervening party on this and other contentions that involve protected information, by reason of the Board's protective orders has full access to information PFS considers proprietary. Assuming that a protected information claim relative to a pleading and/or attachments is supported by a properly executed affidavit,

we see no reason at this juncture to engage in the considerable effort that may be involved in parsing the various parties' pleadings to identify and then resolve the question of what information has that protected status. This is a matter that is best left to the conclusion of the merits of this litigation. As a consequence, we deny the State's requests for a determination regarding, and release of, all claimed proprietary information pertaining to the December 3, 1999 PFS summary disposition motion, which we understand to include all PFS and staff pleadings marked as containing such information, albeit without prejudice to their renewal at a future time designated by the Board.

III. COMMISSION REFERRAL

In ruling on the PFS dispositive motion, we take one additional action we find appropriate in light of the particular circumstances here. Under 10 C.F.R. § 2.730(f), a Licensing Board is given the authority, in instances when a prompt Commission decision is necessary to prevent detriment to the public interest or unusual delay or expense, to refer its ruling on a party motion or other pleading to the Commission for its immediate consideration.

Generally, we would be reluctant to use this authority to refer a summary disposition ruling to the Commission.

Although a summary disposition decision constitutes a merits ruling on a contention "as a matter of law," it nonetheless often has a factual element that would make referral of questionable propriety. See Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 & n.6 (1977). Certainly, our summary disposition ruling in this instance has a factual element to it.

Nonetheless, we invoke this provision and refer our ruling in section II.A-C above to the Commission. At the heart of our determination here is the legal question of the application and interpretation of the reasonable assurance standard of 10 C.F.R. § 72.22(e) in light of the Commission's financial assurance ruling in Claiborne. Moreover, any reluctance we otherwise may have is, in significant measure, outweighed by the Commission's recent admonition that "boards are encouraged to certify novel legal or policy questions relating to admitted issues to the Commission as early as possible in the proceeding." Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998). Coupled with the Commission's expression of interest regarding the application of the financial assurance provisions of Part 72 to this proceeding previously quoted in section I.B above,

see CLI-98-13, 48 NRC at 36-37, this guidance convinces us such an action is warranted in this instance, with the realization that, if we are wrong in this regard, the Commission can simply chose to decline the referral.[12] See Marble Hill, ALAB-405, 5 NRC at 1192-93.

IV. CONCLUSION

Recognizing proposed license conditions LC17-1 and LC17-2 set forth in the NRC staff's December 15, 1999 SER for the PFS facility and the PFS commitments 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

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[12] This date, we also make several additional rulings that bear some relationship to our decision regarding the PFS dispositive motion, including rulings on State discovery requests to PFS and the staff and State request to admit late-filed amendments to contention Utah E/Confederated Tribe F. Although we do not refer these rulings, or the portion of this decision relating to the State's request for proprietary information release, in the exercise of its inherent supervisory authority over the agency's adjudicatory process the Commission obviously is free to take up these matters if it wishes.

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,

with regard to contention Utah E/Confederated Tribes F, Financial Assurance, the December 3, 1999 PFS motion for partial summary disposition is granted as to those paragraphs of the contention identified as one through five (other than the onsite liability insurance issue), seven through nine, and paragraph ten as it relates to offsite liability insurance, and is denied as to those parts of paragraphs five and ten that relate to onsite property insurance. In addition, the State's December 27, 1999, and January 10, 2000 requests to require the disclosure of information designated by PFS as proprietary are denied as premature. Finally, in accordance with 10 C.F.R.

§ 2.730(f), the Board refers its rulings in section II.A-C above to the Commission for its consideration.[13]

For the foregoing reasons, it is this tenth day of March 2000, ORDERED, that:

1. The December 3, 1999 PFS motion for partial summary disposition of contention Utah E/Confederated Tribes F is granted in part and denied in part as described in section IV above;

2. The parties should provide the Board with a joint report on further litigation of paragraphs five, six and ten of contention Utah E/Confederated Tribes F under the schedule outlined in section II.D above.

3. The December 27, 1999, and January 10, 2000 State requests to disclose all proprietary information in the PFS and staff pleadings relating to the PFS December 3, 1999 partial summary disposition motion are denied, without prejudice to their subsequent renewal at a time designed by the Board following the conclusion of the Board litigation

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[13] We would add that, in making this referral, the Board does not contemplate that the pendency of the referral should cause any delay in the litigation of contention subparts five, six, and ten that are not resolved here. See 10 C.F.R. § 2.730(g).

of the merits of the contentions admitted in this proceeding;

4. On or before Friday, March 17, 2000, the State, PFS, and the staff should advise the Board in a joint filing whether they have any objection to the public release of any specific parts of this memorandum and order because it would involve the disclosure of propriety information subject to nondisclosure under 10 C.F.R. § 2.790; and

5. In accordance with 10 C.F.R. § 2.730(f), the Board's rulings in section II.A-C above are referred to the

Commission for its consideration and further action, as appropriate.

THE ATOMIC SAFETY
AND LICENSING BOARD[14]

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

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[14] Pursuant to recent Board issuances on e-mail service of documents identified as containing proprietary information, copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for PFS, the State, and the staff. In addition, this date a memorandum was sent by e-mail to all the parties in this proceeding advising them of the issuance of this decision and the Board's determination to afford this decision confidential treatment pending a response by the State, PFS, and the staff to the Board's inquiry under ordering paragraph four above. See Licensing Board Memorandum (Notice Regarding Issuance of Decision on Motion for Partial Summary Disposition of Contention Utah E/Confederated Tribes F) (March 10, 2000) (unpublished).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE, L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent Fuel Storage Installation)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING IN PART, DENYING IN PART, AND REFERRING RULING ON SUMMARY DISPOSITION MOTION REGARDING CONTENTION UTAH E/CONFEDERATED TRIBES F) (LBP-00-06) 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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U.S. Nuclear Regulatory Commission
Washington, DC 20555

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Docket No. 72-22-ISFSI
LB MEMORANDUM AND ORDER
(GRANTING IN PART, DENYING IN PART,
AND REFERRING RULING ON SUMMARY
DISPOSITION MOTION REGARDING
CONTENTION UTAH E/CONFEDERATED
TRIBES F) (LBP-00-06)

Adria T. Byrdsong
Office of the Secretary of the Commission

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