UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

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

CLI-04-10

MEMORANDUM AND ORDER
(Original Version Contains Proprietary Information)

Private Fuel Storage, L.L.C. (PFS) and the State of Utah have filed cross petitions for review of Licensing Board decisions concerning financial qualifications and decommissioning funding. PFS seeks review of one order--the Licensing Board's January 5, 2004 Memorandum and Order Granting in Part and Denying in Part Motion for Reconsideration and/or Clarification of Financial Qualifications Decisions (unpublished) ("Reconsideration Ruling"). Utah seeks review of several related orders--the Board's May 27, 2003 Partial Initial Decision (Contention Utah E/Confederated Tribes F, Financial Assurance) ("PID-E"), its May 27, 2003 Partial Initial Decision (Utah S, Decommissioning) ("PID-S"), its May 27, 2003 Memorandum and Order (Rulings on

Summary Disposition Motion and Other Filings Relating to Remand From CLI-00-13) ("MSA Ruling"), and its January 5, 2004 Reconsideration Ruling.[1]

The Commission has full discretion whether to undertake appellate review of its licensing boards' merits decisions. NRC rules say that the Commission may grant review of initial Board decisions (or partial initial decisions) based on "any consideration" it "deems to be in the public interest."[2] Review is particularly appropriate where the Board's ruling may have made a clear error as to a material fact, where the ruling turns on a legal conclusion that is without precedent or conflicts with existing precedent, or where the ruling raises an important policy issue that the Commission itself should consider.[3]

For the reasons set forth below, we grant review of PFS's claims concerning whether PFS must have service contracts in place to cover O&M costs for 1000 casks prior to beginning operations and whether those contracts must be in a specific dollar amount. We deny review of the issues raised in Utah's petition.

I. BACKGROUND

The petitions for review concern Utah Contention E/Confederated Tribes F, raising the question whether PFS has provided reasonable assurance of being able to cover its costs of

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[1]This series of Board decisions remains unpublished because of as yet unresolved questions of proprietary information and confidentiality.

[2]*See* 10 C.F.R. § 2.786(b)(4); *see generally Private Fuel Storage, L.L.C.*, CLI-04-4, 59 NRC __ (2004), slip op. at 1-2. Throughout this decision we refer to the provisions of our former Part 2, which applies to this proceeding. Effective February 14, 2004, we have changed Part 2 in significant respects. *See Changes to Adjudicatory Process; Final Rule*, 60 Fed. Reg. 2182 (Jan. 14, 2004).

[3]*See* 10 C.F.R. § 2.786(b)(4).

operating and maintaining its proposed facility, and Utah Contention S, raising the question whether PFS will have adequate decommissioning funding.[4]

In a March 2000 decision in response to a PFS motion for summary disposition of Utah E, the Board found that only two issues should proceed to hearing: the accuracy of PFS's operation and maintenance cost estimate, and the adequacy of its onsite liability insurance coverage.[5] The Board found that two license conditions proposed by the NRC staff provided reasonable financial assurance. The first required that PFS have enough funds committed to construct the entire first phase of the project prior to beginning any construction, and the second required that it have service contracts in place to cover operational, maintenance and decommissioning costs prior to accepting spent fuel for storage. The Board referred to the Commission its ruling that these conditions provided reasonable financial assurance. In CLI-00-13, the Commission affirmed the Board's ruling, thus approving the concept of service agreements as a means to show financial assurance. But the Commission required PFS, on remand, to produce a model service agreement for the Board's review so that Utah could raise (and litigate) any deficiencies in the agreement's terms.[6]

On remand, the Board issued a decision finding the model service agreement adequate despite a series of Utah challenges.[7] The Board also found that PFS had met its burden to show

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[4] *See* 10 C.F.R. §72.22(e).

[5] *See* LBP-00-6, 51 NRC 101 (2000).

[6] CLI-00-13, 52 NRC at 35.

[7] *See* MSA Ruling, slip op. at 80-81.

reasonable assurance of adequate financing.[8] Finally, the Board required PFS, prior to operation, to have in place sufficient service contracts to fund the estimated operating costs of a full-size, 4000-cask facility.[9] On reconsideration, the Board relaxed the initial funded capacity to 1000 casks.[10]

Much earlier, in June, 2000--before the Commission had issued CLI-00-13--the Board had held hearings on estimated costs of operation, maintenance, decommissioning and liability insurance. At the time of the June 2000 hearings, PFS had in place a financing plan quite different from the one that emerged later in connection with litigation over the model service agreement.

The original PFS plan called for the customer to pay a "base storage fee," divided into three lump sum payments, and annual storage fees.[11] The lump sums would cover construction, canister and other up-front costs. Under PFS's current plan, the only sum certain the customer is obligated to pay is a nonrefundable **xxxxxxxx** "commitment fee" upon signing.[12] In addition to the commitment fee, to cover construction costs, PFS's new scheme calls for its customers to **xxxxxxxxxx** in the amount of **xxxxxxxxx** per kilogram of uranium in "reserved capacity," the amount of fuel the customer plans to store.[13] **xxxxxxxxxxx.**

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[8]*See* PID-E, slip op. at 101-102.

[9]*See* PID-E, slip op. at 87; 95.

[10]*See* Reconsideration Ruling, slip op. at 16-17.

[11]For a comparison of previous funding scheme versus PFS's new plan, *see* MSA Decision, slip op. at 5-13.

[12]*Id*.

[13]*See id.* at 7-8.

The new plan calls for customers to pay estimated annual operation and maintenance costs up-front on a quarterly basis.[14] At the end of each year, the customer is either billed or credited to reflect the difference between the estimated and actual costs. Whereas the previous plan called for canister and cask costs to come out of a second lump sum payment to PFS, now the plan calls for the customers to own the casks and canisters and pay the vendors directly. Upon shipping a cask, the customer pays its allocated portion of decommissioning costs.[15]

In November 2000, Utah voiced various objections to the new financing plan and moved to reopen the record in the June evidentiary hearings. The Board ultimately refused to reopen the record, finding that the changes in PFS's financing scheme and Utah's objections to it would not "materially alter the result" of the hearing, as required for reopening a hearing record.[16] The Board agreed with PFS's argument that the subject of the June hearings was cost estimates only.[17] The Board noted that Utah had not filed any late-filed contention in light of PFS's changed financial plan, but rested on its previous contention.[18] None of Utah's concerns about the new financing plan fell within the scope of the hearings or would alter the result, the Board concluded.[19]

Before us today is Utah's challenge to the Board's decision, its challenge to the Board's approval of the model service agreement, and its challenge to the Board's overall financial

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[14]*Id.* at 8.

[15]*Id.* at 9.

[16]10 C.F.R. §2.734(a).

[17]MSA Ruling, slip op. at 78-80.

[18]*See* id. at 57, n. 7.

[19]*Id.* at 80.

assurance holding. Also before us are PFS's claims that the Board imposed unnecessarily restrictive financial conditions on operating the proposed PFS facility.

II. DISCUSSION

A. PFS Petition for Review

PFS requests review of the Board's requirements that (1) a specific dollar amount of projected O&M costs must be covered by customer service agreements in order to satisfy the license conditions the Commission approved in CLI-00-13, and (2) PFS have customer service agreements in place to cover the full O&M costs of at least a 10,000 MTU (1000 cask) facility prior to beginning operations.

1. "Specific Dollar Amount" Requirement

PFS argues that it need not have agreements in a specific dollar amount because it intends to use "passthrough" contracts wherein the customer agrees to pay for all associated O&M costs, similar to the contracts approved by the Commission a few years ago in a license transfer case, *Northern States Power Co.* (Monticello Nuclear Generating Plant).[20] On reconsideration, the Board rejected this argument because the Commission in CLI-00-13 had explicitly provided that PFS should have contracts in place to cover costs in an "amount to be determined at a hearing."[21] The Board noted that the Commission's directive in CLI-00-13 requiring contracts for specific amounts predated the MSA cost passthrough scheme, but said:

[20]CLI-00-14, 52 NRC 37 (2000) (order issued the same day as CLI-00-13) .

[21]*See* Reconsideration Ruling, slip op. at 12; *see also* CLI-00-13, 52 NRC at 36.

“to the extent PFS now considers that mechanism a basis for negating the Commission’s directive, this seems a matter best taken up with the Commission.”[22]

The NRC staff opposes review of the “specific dollar amount” issue. The staff agrees with the Board that the Commission’s order in CLI-00-13 called for contracts in a specific dollar amount, as determined by the Board after a hearing. It argues that PFS should have asked the Commission to revise its directive, rather than asking the Board to change its ruling on a motion for reconsideration. The staff also notes various differences between PFS’s situation and that of Nuclear Management, the power plant operators whose passthrough contracts the Commission found adequate in the *Monticello* case.[23] For example, the staff says, in *Monticello*, Nuclear Management’s sole customer was an electric utility with rate-backed revenues. Finally, the staff argued that PFS “never sought to eliminate consideration of its cost estimates and prices as a basis for demonstrating financial assurances.”[24] Utah opposes the PFS position on similar grounds.

But the differences or similarities between the PFS plan and the situation in the *Monticello* case may prove irrelevant. The Board found that the model service agreement provides reasonable financial assurance, even though the executed contracts would not provide

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[22]MSA Ruling at 13, n. 9.

[23]*See* “NRC Staff’s Response to ‘Applicant’s Petition for Review of Memorandum and Order Granting and Denying in Part Motion for Reconsideration And/Or Clarification of Financial Qualification Decisions,’” at 7-8.

[24]Two years elapsed between the hearings on cost estimates and the Board’s decisions on financial assurance, during which time PFS developed its new financing plan. It is not clear, however, that using “passthrough” contracts would eliminate the need to estimate the costs of the facility. NRC regulations require that the licensee provide reasonable assurance that it will be able to cover “estimated costs.” 10 C.F.R. §72.22(e). This suggests that a cost estimate would be necessary regardless of the type of billing method in the service contracts.

for a specific sum but would be passthrough contracts. If the Board's decision stands as it is, the service agreements may have to be redrafted.[25]

The PFS petition for review and the responses do not adequately clarify the seeming contradiction between approving the passthrough contracts–which apparently lack specific dollar amounts–and requiring contracts for a specific sum as a condition of operation. Hence, we have decided to grant PFS's petition for review in the expectation that full briefing will shed light on the matter.

***2. O&M for Initial Capacity Facility of 1000 Units*.**

PFS also contests the Board's finding that it must have service agreements in place to cover O&M costs and decommissioning costs sufficient for a 1000 unit facility prior to beginning operations.[26] PFS's application is for a facility holding up to 4000 units. PFS points out, though, that it has always planned to build the facility in stages.

The Board initially held that PFS must have service contracts in place to cover the full amount of estimated operating, maintenance and decommissioning costs for a 4000-unit facility.[27] PFS's reconsideration motion argued that it always planned to build in stages, and that in CLI-00-13, the Commission did not require O&M funding for a 4000 unit facility prior to commencing operations. On reconsideration, the Board decided to require full O&M funding for

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[25]It is possible that the Board meant that **xxxxxxxxx**, as provided in the MSAs, must equal 1/120 of the Board's estimated costs (20 years times 4 quarters), but that is not clear from the decisions.

[26]*See* Reconsideration Ruling, slip op. at 16-17.

[27]PID-E at 101-102.

a 1000 unit facility.[28] The Board chose this figure because the record was “replete” with references to a 1000 unit initial capacity facility.[29]

PFS objects to the 1000 unit figure, arguing that it never said it would start operations with as many as 1000 units. It wants to begin operations as soon as it has enough service contracts to cover fixed costs plus per unit costs, whatever that initial number of units will be.

The license conditions as originally proposed by the NRC staff in the SER, and as substantially approved by the Commission in CLI-00-13, required that prior to construction, PFS have full funding for *construction* of “a facility with the initial capacity as specified by PFS to NRC.”[30] In CLI-00-13, the Commission also ordered that license conditions should require that operations would not begin until service contracts were in place to cover operational, maintenance and decommissioning costs, but did not refer to the “initial capacity.” But the Board seemingly interpreted CLI-00-13 to require specifying a total dollar amount for which PFS must have commitments prior to commencing *operations*, which would in turn require the Board to pick a certain number of casks for startup.

There is a substantial practical difference between a license condition that requires full funding for *constructing* a facility of a certain capacity, and one that requires full funding sufficient to cover operations and decommissioning for that same number of casks. As long as the Board’s estimates of fixed and per-unit costs is accurate, it seems reasonable that PFS could satisfy NRC’s financial assurance regulations at the operational stage by having service

[28]Reconsideration Ruling, slip op. at 18.

[29]*Id.* at 16-17.

[30](Emphasis added). CLI-00-13, 52 NRC at 27. The “initial capacity” was omitted from the SER as proprietary information.

contracts in place that cover both the fixed costs and the per-unit costs for each cask actually accepted.

The Board ruling requiring O&M funding for a specific facility size, therefore, arguably reflects a mistake of law or fact, perhaps deriving from ambiguities in our own opinion in CLI-00-13. We intend to examine this issue more closely upon receipt of full briefs. We therefore accept review of this issue.

B. Utah's Petition for Review

Before addressing the specific charges of error in Utah's petition for review, we offer a few general observations. In CLI-00-13, the Commission approved the use of license conditions, including customer service agreements, as a means of showing PFS's financial assurance. At the time, PFS proposed to use service contracts that would ensure that it has a dependable revenue stream to cover its costs of running the facility throughout the term of the license. CLI-00-13 approved the NRC staff's proposal to use license conditions to establish enforceable financial assurance commitments. The Commission also directed that PFS produce a model service contract for review by the Board.

The point of having the model service agreement supplied and reviewed by the Board was to give Utah and the NRC staff an opportunity to uncover legal weaknesses or loopholes in the model agreement that would permit a customer to walk away from its waste or leave PFS with costs that it could not recover from its clients. But to a great extent, Utah complains not of flaws in the contracts themselves, but argues that either (1) the terms of the contracts are so lopsided that no customer would enter them or (2) the customer would simply ignore its contractual obligations.

The first complaint is simply addressed: if a particular nuclear power plant operator does not agree to the terms of the model service agreement, that operator will not store spent fuel at the PFS facility. If PFS can find no customers willing to enter into the contracts, then the PFS facility will never commence operations, even if PFS obtains an NRC license. The second concern is completely speculative. All of PFS's potential customers are NRC licensees–many are rate-regulated utilities--and all have themselves previously undergone evaluations of their financial capability to operate their facilities safely, including waste storage. We reject Utah's suggestion that PFS must establish the creditworthiness of each and every potential customer prior to operations. It is enough that PFS's customers will have the ability and contractual obligation to pay. PFS cannot be expected to prove that all of its customers invariably will fulfill their financial commitments. There is always a risk in business that some customer may ignore its obligations and force its creditor into court. "The Commission will accept financial assurances based on plausible assumptions and forecasts, even though the possibility is not insignificant that things will turn out less favorably than expected."[31]

Keeping these general observations in mind, we review each of the specific issues raised in Utah's petition.

1. PFS License Conditions Go Far Beyond __Claiborne__[32]

Utah argues that the Commission should look again at PFS's financing plan because it goes far beyond *Claiborne* and the Commission's previous assumptions about the PFS plan. Utah argues PFS has substantially revised its financial plan from what it was when the

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[31]*North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 222 (1999).

[32]*Louisiana Energy Services* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997).

Commission initially approved the license condition concept. Specifically, PFS will have no capital contributions from its members, will seek no commercial loans, and will rely entirely on revenues from its customers for operating costs.

This argument appears to be an attempt to relitigate the Commission's prior approval of the service contract device as a means of establishing financial qualifications.

Utah's reliance on distinguishing PFS's plan from the license applicant's in *Claiborne* is inapposite. Financial assurance must be viewed on a case-by-case basis. A license applicant's financial plan reflects estimated construction and operating costs, revenue streams, etc., which will vary dramatically depending on the type of facility. Here, a storage facility is entirely different from the uranium enrichment facility at issue in *Claiborne.* Consequently, the financial mechanisms necessary to show financial assurance will undoubtedly differ.

While Utah attempts to point out various disparities between the PFS plan and LES's in *Claiborne*, it ignores the fact that many of the "weaknesses" of which it complains in its petition were present in the LES case. For example, Utah objects that PFS will have no commercial loans; but in *Claiborne*, at the time the Commission found LES financially qualified, no lender had committed to finance the project either.[33] As the Commission found, "the LES financial plan [was] not based on prelicensing funding commitments from either the LES partners or lending institutions." And just as PFS relies on what Utah styles "hypothetical customers," LES had no executed enrichment contracts in hand at the licensing phase.[34] Both LES and PFS relied primarily on their own commitments not to go forward with the project without the contracts in hand.

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[33]*Id.* at 304.

[34]*Id.*

In some respects, PFS's plan offers greater assurances than those present in *Claiborne*. For example, PFS plans to use service contracts covering the entire life of the license. In contrast, LES's "long-term service contracts" were of only five years' duration.[35] LES faced greater challenges meeting its operating expenses given the highly competitive world market for enriched uranium. PFS, on the other hand, has no competitors now or in the foreseeable future for private, away-from-reactor dry storage. Finally, LES never produced a model contract for scrutiny by the Board, staff and intervenor, as PFS has done.

While there no doubt are substantial differences between the LES plan and PFS's, the fundamental question is whether PFS's plan departs from governing regulations, the Commission's controlling order on financial qualifications (CLI-00-13), and sound financial sense. Utah cites no regulation the PFS plan violates, and no specific conflict with CLI-00-13. Further, Utah's argument that financial soundness requires PFS to have equity payments from members or commercial loans is fact-driven. The Board saw the record otherwise.[36] Utah has not shown that the Board erred in finding the plan adequate despite the full reliance on customer service contracts for funding.

2. Non-specificity of License Conditions

Utah claims that the license conditions should be made more specific to incorporate promises (1) to use the approved model service agreement, (2) to obtain insurance in the amount determined by the Board, and (3) to annually review decommissioning costs to ensure the adequacy of funding.

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[35] *Id.*

[36] *See e.g.*, MSA Ruling, slip op. at 22-23 (rejecting argument that PFS will have "no assets").

We held in an earlier decision in this proceeding that not all licensee commitments need to be reduced to license conditions in order to bind PFS.[37] Utah's complaints help to illustrate why this is true. The Commission's order in CLI-00-13 suffices to ensure that the service agreements actually entered by PFS depart in no material respect from the model service agreement. As we explained in CLI-00-13, minor variations may be acceptable, but we reasonably can leave to the NRC staff the task of monitoring the agreements and making sure that PFS lives up to its commitments.[38]

Utah wants incorporated as a license condition the Board's order that PFS obtain insurance in the appropriate amount as the Board determined.[39] This concern also does not warrant Commission review. The Board's order fully binds PFS. Because we see no suggestion of error in the Board's determination of the amount of insurance, we will not review it.

Finally, Utah wants a license condition requiring PFS to review its decommissioning costs annually. The Board found a specific license condition to be unnecessary, because the Commission's regulations already require a Part 72 licensee to conduct "periodic" reviews.[40] In addition, the Board found a license condition unnecessary because PFS had publicly committed to conducting annual reviews, and because its customers, by contract, would cover any

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[37]*See* CLI-01-09, 53 NRC 232, 236 (2001).

[38]*See* CLI-00-13, 52 NRC at 34-35 (Staff is allowed "room to exercise professional judgment").

[39]*See* PID-E at 100-101. Because PFS committed to pay **xxxx** per annum and obtain at least $70 million in insurance coverage, the Board ordered PFS to obtain insurance coverage of either $70 million or the amount that a **xxxxx** annual premium will obtain, whichever is greater.

[40]10 C.F.R. §72.30 (b).

decommissioning funding shortfall.[41] In light of these considerations, the Board's ruling is appropriate.

3. The Model Service Agreement Does Not Satisfy Bases 1-10 of Utah E

Utah contends that the Board erred in finding that the model service agreement resolved the issues raised in its financial assurance contention (Utah E). Utah claims that the Board violated due process in refusing to reopen the record of the June 2000 hearing to address Utah's concerns with the model service agreement, and in denying Utah discovery.

The Board found that the standard for reopening the record was that the new evidence must "materially alter the outcome of the hearing." The Board found that Utah's concerns would not. The Board stressed that the subject of the June 2000 hearing was PFS cost estimates, not PFS's method of recovering those costs from its customers. The Board further ruled that the ambiguities Utah found in the model service agreements did not demonstrate that there were "relevant uncertainties significantly greater than those that usually cloud business outlooks" in the PFS business plan.[42]

Utah contends that because the model service agreement is so "lopsided and open-ended that no reasonable business would enter into them," PFS's business plan is completely unrealistic. Utah points out that no customer has yet entered into one of PFS's contracts. It also argues that the model service agreement is "illusory" and the NRC's financial assurance finding should be based on executed contracts.

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[41]*See* PID-S, slip op. at 45-47.

[42]PID-E, slip op. at 63-64, *quoting North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 222 (1999).

Our decision in CLI-00-13 already addressed Utah's concerns that no customer will agree to the terms of the model service agreement. PFS cannot commence operations until funding is committed–that is, until long-term agreements are entered. Hence, if no customer enters into the service agreements, then PFS may not start up operations. The Board's ruling in PID-E also recognized this.[43] While it is evidently true that no customer has yet entered into a contract with the as yet unlicensed facility, this fact alone does not expose any weakness in the contract that would allow a customer to walk away from its spent fuel or payment obligations. Our decision in CLI-00-13 contemplated that financial assurance could be demonstrated by a *model* contract coupled with PFS's commitment to use that model. We see no reason to revisit that holding now.

The Board's decision not to reopen the record (or to restart discovery) correctly applied the standard for reopening a hearing record. It was also consistent with the Commission's direction in CLI-00-13 and NRC's financial assurance regulations. There is no need for further Commission review here.

4. Inadequacy of Model Service Agreement to Meet PFS's Costs.

Utah objects that PFS's financing scheme does not require it to have sufficient cash on hand to cover costs as they arise, creating the potential for PFS to risk safety to save costs. Utah faults PFS's proposal **xxxxxxxxxxxxx**. Utah also contends that financing its operations through service agreements is unreliable because it depends on the creditworthiness of PFS's customers.

[43]*See, e.g.*, MSA Decision, slip op. at 76 ("And to the degree those provisions create questions about the extent to which PFS will be able to find customers willing to contract with it for SNF storage services under the MSA, LC-1 and LC-2 make it clear that PFS bears the risk that its funding design will leave it unable to attract a sufficient number of customers and so be unable to receive authorization to construct and/or operate the facility").

The flaw in the scheme, as Utah sees it, is the likelihood that some of the customers that enter the service contracts will not pay their bills on time. Fundamentally, then, the "inadequacy" of which Utah complains is not with the model service agreement as written, but with the possibility that PFS customers will evade their contractual obligations.

The Board considered Utah's concerns, and found that PFS customers were reasonably creditworthy:

> [T]o the degree the State has concerns about continued customer viability in the context of facility operations and the concomitant lack of a large PFS cash reserve to address this purported (albeit somewhat overstated) problem, ... general, undifferentiated concerns about the future viability of PFS customers are not adequate to establish a lack of compliance with Part 72 financial assurance provisions, particularly when such concerns are expressed (1) relative to entities already subject to Part 50 financial qualifications requirements, ... and (2) in the face of MSA requirements for regular, quarterly payments of all PFS estimated costs ... [44]

In addition, the service agreements must have provisions requiring customers to periodically provide updated credit information and additional financial assurances.[45] In light of the Commission's prior approval of service agreements as evidence that PFS will have an adequate revenue stream, the Board did not err in accepting these particular service contracts as assurance of revenue.

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[44] MSA Ruling at 63-64 (internal citations omitted).

[45] A license condition will require the service agreements to include these provisions. CLI-00-13, 52 NRC at 36.

5. Board's Ruling Allows PFS to Avoid Showing Reasonable Financial Assurances Throughout the Life of the Facility

Utah complains that in allowing the passthrough contracts to substitute for estimating some costs, the Board ignored §72.22(e)'s requirement that the applicant must show "reasonable assurance of obtaining the necessary[] funds ... to cover ... [e]stimated operating costs over the planned life of the ISFSI." This, Utah says clearly requires that costs be estimated prior to finding financial assurance.

Utah argues that PFS has not demonstrated funding through the "planned life of the facility," because the Board found that the service agreements actually entered would only need to cover the O&M for the 20-year license term, not the facility's actual planned life of 40 years. Utah claims that the Board should not have halved the amount of costs that PFS needs to operate the facility through the anticipated 40 years of operation. But the Commission held in CLI-00-13 that service contracts should be in place to cover "the life of the license."[46] In addition, while PFS readily admits that it may seek to renew its license after 20 years, there is no certainty about that. PFS's continued existence will depend on a continued need for private away-from-reactor storage. If such a need develops, financial assurance for the renewal term will be an issue for the license renewal proceeding. It was not error for the Board to choose 20 years as the applicable term.

Utah also claims that the use of passthrough contracts directly violates the NRC rule, 10 C.F.R. §72.22(e), requiring reasonable assurance that it will "obtain" funds to cover estimated O&M costs. Utah claims that passing costs on to customers is not the same as "obtaining funds." But the Commission has already held, in this case and in *Claiborne* before it, that having

[46] 52 NRC at 36.

binding service contracts in place can provide reasonable assurance that the licensee will obtain the necessary funds. Again, this is not the time to relitigate issues settled earlier in this proceeding.

6. Board's Rulings Require Staff to Make Subjective, Non-Ministerial Post-Licensing Judgments

Utah complains that likely customer resistance to the "lopsided" service agreements will result in significant alterations, which in turn will require the NRC staff to make sophisticated legal judgments in determining whether PFS has complied with its license conditions. We reject this argument. First, it relies on the claim that PFS will violate its license condition by willfully redrafting the contracts to its own financial peril, which we find speculative. In addition, Utah's argument presumes that the NRC staff cannot be relied on to recognize a significant alteration in the contract that PFS has bound itself to follow. We already have discussed, in CLI-00-13, the scope of the NRC staff's post-licensing authority to review PFS's compliance with its license conditions.[47]

V. CONCLUSION

For the foregoing reasons, the Commission grants review of PFS's claims of error and denies review of Utah's claims of error. The parties are directed to file briefs, not to exceed 25 pages, on the two issues on which review is accepted. PFS should file its opening brief within 21 days of this order; the NRC staff and Utah should file their answering briefs within 21 days after receipt of PFS's brief. PFS may file a reply brief, not to exceed 5 pages, within 7 days after receipt of the staff and PFS briefs. The NRC staff may also file a short brief (not to exceed 10

[47] *See* 52 NRC at 34-35.

pages) in support of PFS in the facility size issue. That brief must be filed at the same time as PFS's opening brief.

All briefs should be served electronically. Any brief exceeding 10 pages shall contain a table of cases and authorities and a table of contents. Any interested *amici curiae* are authorized to file briefs as set out above, at the time of the party they support.

Finally, because today's decision discusses PFS's financial plan it contains proprietary information. The parties, may, if they choose, submit to the Commission a designation of appropriate redactions prior to our order's publication. We will withhold publishing for at least 14 days. If we receive any proprietary designation, we will redact the order appropriately prior to publication.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of March, 2004.