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-04-27

MEMORANDUM AND ORDER
(Original Version Contains Proprietary Information)

This order addresses two issues concerning the financial assurance given by the applicant, Private Fuel Storage, L.L.C. (PFS), in this licensing proceeding. In CLI-04-10,[1] the Commission granted review of two findings in 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[2] ("Reconsideration Ruling").

The first issue is whether, prior to beginning operations, PFS should be required to have service contracts in place with prices set in a specific amount as determined at the evidentiary

[1]Unpublished pending resolution of proprietary redactions issues. CLI-04-10 also rejected various challenges to the Board's financial assurance rulings. In today's decision we address PFS-proposed issues on which we granted review.

[2]Unpublished pending resolution of proprietary redactions issues.

hearing. The second is whether the service contracts must add up to an amount sufficient to fund operations for a full-to-capacity, 1000-unit facility.

We find that changes in PFS's financial plan make it appropriate to modify a financial license condition that the Commission imposed in 2000.[3] That condition directed PFS "not to commence operations before service agreements for the life of the license, with prices adequate to fund operations, maintenance, and decommissioning, in the amount to be determined at hearing, are in place."[4] We now find that if PFS's license is subject to the condition that it use "cost passthrough" service contracts, in substantially the form submitted to and approved by the Board, with respect to all fuel accepted for storage, then we are reasonably assured that PFS will have the financial means to safely operate and decommission the proposed facility. This modified condition allows PFS to use its Board-approved service contracts without redrafting them to state specific prices for storage services. The condition also allows PFS to commence operations without regard to the number of casks initially stored. Finally, the condition makes the obligation to use the Board-approved service contract a continuing one, so that all fuel will be covered by similar contracts throughout the PFS license.

Therefore, in light of changed circumstances, we modify our previous ruling as described above, and we vacate that portion of the Board's order requiring PFS to have service contracts with preset prices sufficient to cover operating and decommissioning costs for 1000 units.[5] Instead, we require that PFS enter service contracts covering all costs relating to the customers'

---

[3] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000).

[4] *Id.* at 36.

[5] **xxxxxxxxx**.

spent fuel, including common expenses, throughout the storage term for all spent fuel accepted at its facility. If PFS's customers will not enter such contracts, PFS cannot accept their spent fuel.

I. BACKGROUND

The procedural history of the issues decided today is long and somewhat complex. We will summarize it briefly here. Utah first raised its concerns about PFS's financial assurance in its Contention E. In a March 2000 decision responding to PFS's summary disposition motion, the Board found that only two aspects of Utah E should proceed to hearing: the accuracy of PFS's operation and maintenance cost estimate, and the adequacy of its onsite liability insurance coverage.[6] In so ruling, the Board found that two license conditions proposed by the NRC staff provided reasonable assurance that PFS could meet the costs of operating its proposed facility. The first ("LC-1") would require PFS to have enough funds committed to construct the entire first phase of the project prior to beginning any construction. The second ("LC-2") would require PFS to have service contracts in place to cover operational, maintenance and decommissioning costs prior to accepting spent fuel for storage.

Utah objected that using license conditions in this manner effectively deferred PFS's financial assurance determination until after the license is issued, because PFS would not have the service agreements in hand until just prior to starting operations. Utah argued that financial assurance for construction and operations should not be subject to post-license verification, as opposed to pre-license proof. Noting Utah's objections, the Board referred to the Commission its ruling that these conditions provided reasonable financial assurance, and proceeded to hold hearings on the remaining aspects of Utah Contention E in June of 2000.

---

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

In CLI-00-13,[7] issued after the Board's evidentiary hearings, the Commission substantially affirmed the Board's ruling, thus approving license conditions as a means for PFS to show financial assurance. But the Commission required PFS, on remand, to produce a model service agreement ("MSA") for the Board's review so that Utah could raise and litigate any deficiencies in the agreement's terms.[8] The Commission directed that conditions be included in PFS's license so that it was "not to commence operations before service agreements for the life of the license, with prices adequate to fund operations, maintenance, and decommissioning, *in the amount to be determined at hearing*, are in place."[9]

After the issuance of CLI-00-13, and prior to presenting the MSA to the Board, PFS revised its financing plan. The original PFS plan called for the customer to pay a basic storage fee, plus annual fees (with prices escalated according to designated inflation indices). Under the new financing plan, customers are to pay storage costs under so-called "cost-passthrough" contracts. These contracts would not establish set prices, but would require customers to pay PFS's costs. Utah moved to reopen the record of the June 2000 evidentiary hearings in light of PFS's new financial plan.

In May, 2003, the Licensing Board rendered three related decisions,[10] concluding that PFS had demonstrated reasonable assurance that it is financially capable of building, operating, and decommissioning the proposed facility, provided that it comply with the various license

---

[7]52 NRC 23.

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

[9]*Id.* at 36 (emphasis added).

[10]Unpublished pending resolution of issues relating to proprietary information redactions.

conditions. In its Memorandum and Order (Rulings on Summary Disposition Motion and Other Filings Relating to Remand from CLI-00-13), ("MSA Decision"), the Board concluded that the MSA would meet the financial assurance license conditions.[11] It also denied Utah's Motion to Reopen the Record, concluding that none of the matters raised by the state would materially alter the result of the hearings.[12] In its Partial Initial Decision (Contention Utah E/Confederated Tribes F, Financial Assurance), ("PID-E") the Board ruled that prior to beginning operations, PFS should have long-term service contracts in place with prices totaling the operating cost estimate for a 20-year license, as that amount was determined at the June 2000 hearings.[13] The third Partial Initial Decision ("PID-S") found reasonable assurance of decommissioning funding.

The source of the current dispute is the Commission's rephrasing of the license condition LC-2 to require service contracts "with prices adequate to fund operations ... in the amount to be determined at hearing."[14] The Board interpreted this phrase to mean that the contracts must state prices which add up to the estimated costs of running the ISFSI for the entire term of the license. Because the applicable regulation requires the licensee to identify how it will pay "[e]stimated operating costs over the planned life of the ISFSI,"[15] the Board at hearing determined the cost of operating the facility assuming it were filled to maximum capacity allowable under the license. That is, the hearing estimated the maximum possible operating costs. PFS interpreted the Commission's phrasing in CLI-00-13 as requiring only that the

---

[11]MSA Decision, slip op. at 57-73, 80.

[12]*Id.* at 78-80.

[13]PID-E, slip op. at 95.

[14]CLI-00-13, 52 NRC 36.

[15]10 C.F.R. § 72.22(e)(2).

contracts would ensure that all actual costs related to operating the facility are covered, not to require contracts with prices adding up to the maximum possible operating costs.

At PFS's urging, the Board reconsidered its PID-E. The Board found that PFS need not have service contracts sufficient to cover the total operating expenses for a 20-year facility, but need only cover the costs of a full-to-capacity, 1000-unit facility.[16] The Board reasoned that PFS intended to build the facility in stages, with the first stage having a maximum capacity of only 1000 casks. The Board rejected PFS's argument that the cost-passthrough contracts eliminate the need to state specific prices in order to satisfy the conditions imposed by the Commission in CLI-00-13.[17]

PFS now asks the Commission to modify these conditions in two respects. First, it says that the cost-passthrough contracts are sufficient to show financial assurance without the necessity of naming a particular price in them. Including a set price in the service contracts is unnecessary and inconsistent with its overall financing scheme, PFS says. In addition, PFS argues that it does not need contracts to cover operating expenses for 1000 units to demonstrate financial assurance. Because the contracts require each customer to pay its share of the facility's fixed operating costs as well as per-unit costs, PFS says that it will recover all its necessary expenses regardless of how many casks are stored at any given time. Therefore, PFS argues there is no need to have, at the start of operations, contracts with prices totaling the operating expenses that would be incurred if the facility were filled to initial capacity (1000 units).

Utah opposes both of PFS's requests, arguing that they are inconsistent with our prior rulings and would undermine PFS's financial assurance demonstration.

---

[16]Reconsideration Ruling, slip op. at 16-18.

[17]*Id.* at 12.

The NRC staff agrees with PFS that the Board's requirement for funding a 1000-unit facility is unnecessary. But the staff opposes PFS's argument seeking elimination of set prices in the service contracts. The staff takes the position that LC-2 should be revised to allow PFS to start operations as long as it has service contracts with prices equal to fixed costs plus per-unit costs for whatever the initial number of casks stored at the facility will be.

II. DISCUSSION

A. Financial Assurance Standards in Licensing Proceedings

The Atomic Energy Act authorizes the NRC to impose appropriate financial qualifications standards on licensees.[18] NRC requires a licensee to show reasonable assurance that it is able to handle the financial burdens of operating the facility for which a license is sought. For an ISFSI, the applicant must demonstrate that it

> either possesses the necessary funds, or that [it] has reasonable assurance of obtaining the necessary funds; or that by a combination of the two, the applicant will have the necessary funds available to cover the following:
> (1) Estimated construction costs;
> (2) Estimated operating costs over the planned life of the ISFSI; and
> (3) Estimated decommissioning costs ....[19]

If the licensee cannot handle the financial burden of construction, operating, and decommissioning costs, public safety could be compromised. The foundation of our financial assurance requirement is, therefore, to protect the public from radiological hazards that could

---

[18]Atomic Energy Act, § 182(a), 42 U.S.C. §2232(a). *See Public Serv. Co. of NH* (Seabrook Station, Units 1 and 2) CLI-78-1, 7 NRC 1, 8-9 (1978).

[19]10 C.F.R. § 72.22(e).

arise if the licensee is not able to meet expenses.[20] It is not the NRC's duty or desire to micro-manage the finances of its licensees.

Using projections of future revenue is a typical method for license applicants to demonstrate that they can meet costs. In Part 50 reactor licensing cases, which have generally stricter financial requirements than that required for an ISFSI,[21] we require operating license applicants (other than utilities) to submit estimates for the first five years of costs, along with the source of funds to pay them.[22] In the case concerning the financial qualifications for the proposed Claiborne uranium enrichment facility under Part 70, the applicant hoped to use the license itself to attract investors.[23] There, we approved the license subject to conditions preventing the start of operations until the licensee had long-term contracts from potential customers. Thus, in cases where the applicant does not have cash in hand, we have allowed the use of license conditions to ensure that the licensee does not start operations without assurance of future revenues.

---

[20] *See Gulf States Util. Co.* (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 473 (1995).

[21] *See* CLI-00-13, 52 NRC at 30-31.

[22] 10 C.F.R. § 50.33(f)(2).

[23] *See Louisiana Energy Serv.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 308 (1997).

B. Considerations Raised by PFS's Financial Scheme

1. Post-License Verification

Near the heart of the financial assurance inquiry is whether the staff will be able to verify that PFS has complied with the license conditions that are the foundation of its financial assurances. The reason the Commission in CLI-00-13 required PFS to produce its MSA to the Board was to simplify post-license verification. In this appeal PFS itself has raised the verification issue, arguing that if it uses its passthrough MSAs, it would be difficult for the staff to verify whether PFS had met the proposed license conditions as stated by the Board, which includes a "set price" requirement.[24]

Paragraph 4.79 of the Board's PID-E, prior to reconsideration, would have made verification a matter of adding up the prices specified in the existing service contracts to see if they total the estimated operating and maintenance costs:

> In conclusion, we find that in accordance with 10 CFR § 72.22(e)(2), PFS has reasonably estimated the costs of operation and maintenance over the forty-year planned life of the facility, with the exception of $... Tooele County, Utah host payment understatement. In accordance with the Commission's instructions in CLI-00-13, the Board finds that PFS may not commence operations before service agreements for the life of the license (*i.e.*, twenty years) are in place with prices adequate to fund operations, maintenance, and decommissioning in the amount of $... (to be escalated from 1997 dollars to present day value), plus $... for Tooele County host payments.[25]

On reconsideration, the Board found that it was bound by the Commission decision in CLI-00-13 to require PFS to have service contracts "with prices ... in the amount to be determined at [the] hearing" and that it had no authority to waive this requirement in light of PFS's new financing

---

[24]Applicant's Brief on Review of Licensing Board Memorandum and Order Granting and Denying in Part Motion for Reconsideration and Clarification of Financial Qualification Decisions (April 14, 2004) ("PFS Brief"), at 2.

[25]PID-E, slip op. at 95 (footnote omitted).

scheme. But recognizing that requiring PFS to have contracts in advance to cover all costs of a full, 4000-unit facility was unfeasible, the Board softened the requirement by providing that PFS should only have to cover operating expenses of a **xxxxxx**-unit (**xxxxx** MTU) initial capacity facility, **xxxxxxxx**:

> In accordance with the Commission's instructions in CLI-00-13, the Board finds that PFS may not commence operations before service agreements for the life of the license (*i.e.* twenty years) are in place with prices adequate to fund operations, maintenance, and decommissioning for an initial **xxx** MTU capacity facility in the amount of $.... This figure reflects $... for cask, canister, and rail costs ($... per unit x **xxx** casks), plus $... for fixed and other O&M costs over a twenty-year license term, plus $... for Tooele County host payments. All costs are to be escalated from 1997 dollars to present value. Should the initial capacity of the facility as appropriately specified by PFS differ from **xxx** MTU, the above amount may be adjusted according to the actual number of casks to be used.[26]

With this modification, the NRC staff would still be able to verify that PFS has assurance of adequate revenues to cover operating costs, simply by adding up the contract prices.

The NRC staff argues on appeal that, because the Board recognized that it was possible to separate fixed costs from per-unit costs, LC-2 could be modified, consistent with CLI-00-13, to allow PFS to start as long as its service contracts will cover fixed costs plus per-unit costs. Post-license verification could be based on this formula. But the staff's solution does not resolve the problem that the contracts, which the Board found adequate, would have to be rewritten to include the figures that the Board came up with in the evidentiary hearing.

PFS argues that its contracts meet the Board's requirements because LC-2 as stated by the Board in its Reconsideration Decision merely required that PFS have contracts with "prices sufficient to cover" operations & maintenance costs. PFS's contracts will by definition meet those costs because the MSA defines its prices as equaling PFS's actual costs, PFS says. But

[26]Reconsideration ruling at 18 (footnote omitted).

as attractive as this argument is, it does not change the fact CLI-00-13 said that prices should be "in the amount to be determined at a hearing."[27]

We cannot fault the Board for sticking to the precise language of CLI-00-13, but we find that circumstances arising after that decision call for revising it. When CLI-00-13 was issued, PFS planned to use a fixed-price contract, making a license condition based on a fixed price sensible. The Commission decision did not anticipate PFS's change in approach. Considering that new approach now, we find it apparent that PFS designed its MSA to satisfy both the applicable NRC regulations and the intent, if not the language, of CLI-00-13's license conditions. Further, the Board was satisfied with the contracts. Given the change in the underlying facts, we find it appropriate to modify our previous directive concerning license conditions to specifically allow PFS to use its passthrough contract.

This solution also addresses the second problem PFS raises in its brief on review. PFS plans to build, in its first phase of construction, a facility potentially accommodating up to 1000 units. But it will not have 1000 casks onsite at the start of operations. It will take years to fill this phase to capacity. In fact, this phase might never reach full capacity--in which case PFS would never incur the related operating expenses associated with that many casks. It is not practicable to demand from PFS's first few customers that they execute contracts "with prices adequate to fund operations, maintenance, and decommissioning for an initial 10,000 MTU capacity facility," thereby footing the bill for future PFS customers (who may or may not ever come on board).

But when we eliminate the total figure up to which the contract prices must add, we also eliminate the need to pick a number of casks which the contracts must cover. Because the MSA

---

[27]52 NRC at 36.

requires each customer to pay its *pro rata* share of fixed operating costs, PFS is assured of recovering its expenses even if the facility is not filled to capacity.

If we understand Utah's objection, it is that using contracts without demanding they cover the entire cost of a 1000-unit facility would potentially allow PFS to start operations with service contracts covering only the initial casks, but then accept additional casks without adequate service contracts in place. Utah proposes that if PFS is allowed to start operations with fewer than 1000 units, then its licensed capacity should be capped at the amount of that initial inventory (the amount subject to staff post-license verification).

Utah is right that if the finding of reasonable financial assurance rests on PFS's service contracts, then PFS cannot be reasonably assured of meeting "estimated operating costs for the planned life of the ISFSI" unless the license condition requiring PFS to use those contracts extends to all fuel it accepts at the facility. But instead of requiring PFS to have service contracts for all 1000 casks prior to the start of operations, we can reach the same result by modifying the license condition to require PFS to use its approved MSA for all fuel it accepts. This resolves the post-license verification issue as well as Utah's concern that PFS would accept more fuel after verification without adequate contracts. The NRC staff's task in post-license verification is also simplified, in that the staff no longer needs to "add up" the prices in the contracts to make sure they equal a particular amount. The staff need only determine whether an approved "cost passthrough" service agreement is in place.[28]

---

[28]If in the future PFS changes its financial plan, and eliminates "cost-passthrough" contracts, it will have to seek a license amendment. In this regard, it is not the Commission's intent, in ruling on the acceptability of any given license condition, to forestall the Licensing Board's ability to determine the acceptability of an alternative method of meeting NRC financial assurance requirements that might be proposed by this or any other applicant. Our acceptance today of the applicant's porposed contractual format for providing financial assurance simply

(continued...)

***2. Whether PFS Waived the Opportunity to Request Revision to CLI-00-13*.**

Utah claims that PFS has waived its opportunity to challenge the Board's ruling requiring it to have contracts in a specific sum and to ask the Commission to revise its directive in CLI-00-13. Utah points out that PFS asked for the first time in a motion for reconsideration, filed before the Board, that set prices be removed from the anticipated license conditions. According to Utah, this request came too late because, prior to its ruling in PID-E, the Board had explicitly invited the parties to discuss the impacts of CLI-00-13 on their already-filed proposed findings from the June, 2000 hearings.[29] In addition, Utah points out, PFS did not ask the Commission to reconsider CLI-00-13 pursuant to 10 C.F.R. §2.786(e), which provides that a party has 10 days after a Commission decision to do so.

Utah argues in effect that PFS should have realized within 10 days that a single phrase in CLI-00-13 would preclude it from using a passthrough-type contract. In Utah's view, PFS therefore should have either asked the Commission immediately to reconsider that phrase or abandoned the idea of using a passthrough contract.

The Commission reconsiders a decision where it has made a mistake of law or fact. "Reconsideration petitions must establish an error in a Commission decision, based on an elaboration upon, or a refinement of an argument already made, an overlooked controlling decision or principle of law, or a factual clarification."[30] Our rationale for modifying the license

---

[28](...continued)
means that we find the proposal, subject to certain conditions we describe in this order, as one, but not the only, acceptable way to meet financial assurance requirements for this proposed facility.

[29] *See* Board Order (August 4, 2000)(unpublished).

[30] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3),
(continued...)

condition now stems not from a *mistake* of law or fact in the earlier decision but because the facts have *changed*. PFS now has a cost passthrough plan that was not before the Commission in CLI-00-13. Putting aside the fact that it would not necessarily be immediately apparent to PFS that the statements in CLI-00-13 concerning license conditions would preclude a passthrough contract, this was not the type situation where the Commission "reconsiders" its decision. We will not penalize PFS's failure to file a motion for reconsideration by refusing to allow it to use the Board-approved cost passthrough contracts.

Utah also argues that PFS should have moved for the Board to reopen the evidentiary record. But that would have been unnecessary, because the only new evidence relevant to this proceeding was the MSA itself, which the Commission required be submitted for the Board's, staff's and Utah's examination. We do not see that reopening the hearing record would be "[o]ne avenue for PFS to seek elimination of LC-2," as Utah has put it.[31] Whether the reference to "price" in CLI-00-13 is a requirement that shapes the MSA, or whether the form of the MSA can eliminate the requirement of "price," is a legal question, not a fact issue.

Utah also invokes the "law of the case" doctrine to argue that PFS cannot "relitigate" settled rulings. We find this doctrine inapplicable for two reasons. First, issues related to cost passthrough contracts were not decided in our earlier ruling. Rather, the issue before us in CLI-00-13 was whether a license condition requiring PFS to enter contracts would provide reasonable financial assurance. We decided that such contracts are permissible. We then asked the Board, on remand, to evaluate the adequacy of the particular contracts PFS planned

---

[30](...continued)
CLI-02-1, 55 NRC 1, 2 (2002).

[31]Utah Brief at 10.

to use. We did not resolve a then-nonexistent controversy whether prices must be in a pre-determined amount or whether a description of costs covered by the contract would suffice. Because the issue of how PFS should bill its customers was not before the Commission at that time, the law of the case doctrine does not apply. In addition, Commission jurisprudence has long provided that various repose doctrines must give way where “changed circumstances” or “public interest factors” dictate.[32]

3. **Utah is Not Harmed by the Change in PFS’s Pricing Scheme**.

We see no harm to Utah from either the change in PFS’s pricing plan or the timing of that change. Utah has not shown that the MSA failed to include any costs that PFS is likely to incur. The point of requiring PFS to produce a model contract was to give Utah and the Board an opportunity to look for such deficiencies. Having already participated in a four-day evidentiary hearing on cost estimates, Utah should have had a good idea of the type of O&M costs PFS expects to encounter. In addition, PFS submitted a detailed description of every change in its financing plan from what was contemplated at the time of hearing and what was eventually reflected in the MSA.[33] Therefore, when presented with the MSA, Utah was in a good position to examine the MSA to see if there were any omissions.

Utah insists that a contract that does not set a price in advance for all services provides less assurance that PFS will meet expenses. On one hand, a contract that does not name prices may invite the customer to quibble over whether an expense was properly incurred. But on the

---

[32] *Alabama Power Company* (Joseph M. Farely Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203, 204 (1974). *See Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-32, 36 NRC 269, 283-84 (1992).

[33] *See* PFS cover pleading (Sept. 29, 2000), *and* Applicant’s Identification of Additional Provisions that Embody Changes from Previous PFS Representations (Oct. 17, 2000).

other hand, contracts with flexible rather than set prices give better assurance against inflation and unexpected costs that might arise in the future. We find that the second consideration offsets the first. We agree with the Licensing Board that the MSA gives financial assurance comparable to that which would be given by a fixed-price contract.

We also see no harm to Utah from PFS changing in its pricing plan after the June 2000 hearings. The purpose of those hearings was to establish the costs that will arise as PFS operates and maintains the storage facility, not to determine how PFS will meet those costs. The Board's refusal to reopen the evidentiary record was grounded on this distinction.[34]

4. PFS Has Estimated the Costs of Operation as Required by NRC Regulations

Utah argues PFS's plan violates10 C.F.R. § 72.22(e), which contains a requirement that the licensee estimate costs. Specifically, our regulations require the license applicant to provide "reasonable assurance" that it can cover the "estimated costs" of operating and decommissioning the facility. We agree that this regulation requires that costs be estimated. Logically, the Licensing Board cannot find that a licensee is reasonably assured of meeting its "estimated costs" if it has no understanding of those estimates (*e.g.*, the kinds of costs) and how they are to be recorded. We found in *Claiborne Enrichment Center* that a reasonable cost estimate indicates that the licensee "understands its funding commitment and has seriously considered the factors that will contribute to the expense of the project it is undertaking."[35]

Utah's approach, however, appears to convert the need to estimate costs into a need for an NRC-imposed control on the prices the licensee will charge for its services. The Commission never intended in CLI-00-13 to dictate the prices in PFS's contracts to any extent beyond that

[34]PID-E, slip op. at 78-80.

[35]*See* 46 NRC at 307.

necessary to offer reasonable assurance that PFS can meet costs over the life of its facility. The Board also found "nothing in the 'pass through' concept that is violative of the agency's financial assurance regulations."[36]

We do not agree with Utah that using the proposed MSA without including set prices allows PFS to avoid duties imposed by regulation, including the need to estimate costs. PFS provided information relevant to cost estimates at a four-day evidentiary hearing. The Board issued an order in excess of 100 pages concerning those costs.[37] The new financing scheme does not alter the costs, or the cost estimates, themselves.

Utah charges in its brief that removing the set prices from the proposed license condition would amount to a repeal of the regulation's requirement that costs be estimated. But the regulation only requires that the licensee show how it intends to pay for estimated costs; it never imposed a requirement that cost estimates be written into license conditions.

Utah also suggests that PFS is attempting to "evade" its responsibility to "estimate" costs so it can underfund construction and operating expenses in order to attract more customers. There is no logical connection between the passthrough contracts and PFS's supposed devious intent. Even if prices in service contracts were set by license condition, there is no guarantee that PFS would not cut costs on construction and operation and pocket the difference, assuming as Utah does that PFS has no compunction about compromising public safety.

In Utah's view, PFS can have no honest motive for changing from a set price contract to a passthrough contract. It argues that there "is no harm to PFS if the condition to estimate costs remains because the Board ruled favorably on its estimates." But there is possible harm to PFS

---

[36]MSA Decision at 64.

[37]PID-E.

if its estimates are wrong. If PFS encounters unexpectedly high costs due to a surge in prices for one or another component of its facility, or increased labor costs, it could be stuck with a money-losing venture. On the other hand, if some costs go down (for example, if the maker of the casks PFS intends to use suddenly were to slash its prices), PFS would have to cut the prices for its services to remain competitive with on-site storage.

5. The Relevance of *Monticello*[38]

Utah argues that the Commission's ruling in the *Monticello* case is not reliable precedent for approving a passthrough contract because PFS's situation differs in a number of significant respects. In *Monticello*, NRC allowed the transfer of an operating license from an electric utility owner of the plant to its subsidiary, which would operate the plant. We found that a contract requiring the electric utility owner to pay all operating costs incurred by the non-utility operator was enough to establish the financial qualifications of the operator without further proof.

Utah points out three significant differences from the *Monticello*. First, Utah argues that NRC had direct regulatory enforcement power to ensure the owner of the plants in *Monticello* paid the operator, but here NRC will have no enforcement authority to ensure that PFS customers actually pay their bills. Second, in *Monticello*, the owner of the plants had a financial incentive to ensure that the operator of its plants was paid in a timely fashion, whereas PFS's customers have no similar incentive. Third, in *Monticell*o, there was an actual contract between the parties, rather than a hypothetical "model," on which NRC could base its financial assurance determination.

---

[38] *Northern States Power Co.* (Monticello Generating Plant), CLI-00-14, 52 NRC 37 (2000).

We agree that the differences between the PFS situation and that in *Monticello* are considerable. But we do not base approval of the MSA as a means to show financial assurance on the similarities between PFS and *Monticello*. Rather we look at the PFS contracts themselves and ask if the issues Utah raises are enough to destroy our confidence in PFS's financial qualifications. We already approved PFS's use of service contracts in CLI-00-13 and the only question here is whether a passthrough contract will meet expenses as well as a fixed-price contract. We have allowed the use of service contracts to show financial assurance where the high level of assurance present in *Monticello* was not available, as we did, for example, with the Claiborne Enrichment Center.[39] The dissimilarities with *Monticello* to which Utah points are not enough to convince us that a passthrough contract will not offer adequate assurance.

We observe that Utah's first two concerns–lack of NRC enforcement authority and customers' lack of incentive to pay--would be present regardless of whether the service contracts in question are fixed-price or passthrough. In *Claiborne*, we found that the applicant appeared to be financially qualified on the basis of its promises, incorporated in license conditions, that it would not proceed until it had 5-year contracts that would cover construction and initial operating expenses. We did not base that decision on any direct enforcement authority to make the licensee's customers pay their bills.[40] Further, in *Monticell*o, the finding of financial assurance

[39]*Claiborne*, 46 NRC at 304-306.

[40]We did note, however, that the staff's detailed technical review of applications, and the and the Commission's inspection and enforcement tools, provide further assurance that operation will not jeopardize public health and safety. *Claiborne*, 46 NRC 306-308.

was based on the owner's contractual duty and presumed ability to pay (because it was an electric utility), not on any authority NRC might have had to force the owner to pay.[41]

Finally, we ruled in CLI-00-13 that the financial demonstration required of a Part 72 applicant was comparable to that of the *Claiborne* Part 70 applicant; that is, not as rigid as the standard used for a power reactor operating license as the one in *Monticello*.[42]

III. CONCLUSION

We find that PFS can demonstrate reasonable financial assurance so long as its license is subject to the condition that it use its MSA to cover all inventory accepted at the site.[43] This would make the obligation to use the approved contracts a continuing one, so that NRC staff could review the contracts at any time to ensure that PFS is continuing to comply with the license condition. This both satisfies PFS's need for flexibility and allows us to find that PFS "has reasonable assurance of obtaining the necessary funds" to cover "estimated operating costs over

---

[41] *See* 52 NRC at 48-50.

> [W]e find the detailed requirements of [Part 50] not "applicable" to [the operator] [based on:] (1) the nature of [the operator's] licensed activities–*i.e.*, operating the Prairie Island and Monticello plants, not funding them; (2) [the owner's] electric utility status; and (3) [the owner's] contractual commitment to assume full financial responsibility for funding the safe operation, maintenance, and decommissioning of the plants.

Id. at 50.

[42] 52 NRC at 29-31.

[43] We have no reason to believe that PFS is planning to use dissimilar contracts for later customers. It seems unlikely that PFS's initial customers would agree to the MSA as written without some assurance that subsequent customers would also shoulder their *pro rata* share of fixed costs, for example. But the literal terms of LC-2 as previously written referred to contracts at the start of operations, not subsequent contracts.

the planned life of the ISFSI."[44] The Board's order requiring fixed prices in the service contracts and requiring sufficient contracts for a 1000-unit facility is *reversed*.

IT IS SO ORDERED.

For the Commission

/RA/

____
Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, MD
this 7th day of October, 2004

[44]10 C.F.R. §72.22(e).