

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 05/01/00

Before Administrative Judges:

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

SERVED 05/01/00

In the Matter of

PRIVATE FUEL STORAGE, L.L.C.

(Independent Spent Fuel
Storage Installation)

Docket No. 72-22-ISFSI
ASLBP No. 97-732-02-ISFSI
May 1, 2000

MEMORANDUM AND ORDER

(Granting Joint Motion to Approve
Stipulation on Contention Utah S and
Outlining Administrative Matters)

Four Groups I/II-A issues are currently slated for litigation in a June 2000 evidentiary hearing: contention Utah E/Confederated Tribes F, Financial Assurance; contention Utah H, Inadequate Thermal Design; contention Utah R, Emergency Plan; and contention Utah S, Decommissioning. Pending before the Board is an April 7, 2000 joint motion from intervenor State of Utah (State) and applicant Private Fuel Storage, L.L.C., (PFS) requesting that the Board approve a stipulation regarding the scope of this litigation relative to contention Utah S. Additionally, in accordance with its March 24, 2000 memorandum and order, the Board is scheduled to hold a telephone conference on Monday, May 8, 2000, with the

parties to discuss administrative matters relating to the hearing. We address both these matters below.

I. Contention Utah S Joint Stipulation

In their April 7, 2000 motion, both the State and PFS declare that they have agreed that litigation regarding contention Utah S will not involve the estimates that underlie the decontamination costs set forth in the PFS application. Instead, the focus will be the sufficiency of the funding for direct and indirect decommissioning costs, taking into account (1) the year's dollars used to establish the PFS costs; (2) the escalation factors employed to arrive at the future value of those costs; (3) the maximum quantities of spent fuel at the PFS site during the license term; (4) the potential for large accidents; and (5) the means by which PFS will provide sufficient funds if a comparison between the cost estimate and present funds indicates a deficit in present decommissioning plan funding.

This agreement, in turn, affects the scope of contention Utah S as it was admitted for litigation in this proceeding. According to the parties, basis two, regarding the wording of the PFS letter of credit, is no longer at issue. With regard to the remaining four bases -- one, four, five, and ten -- the parties have proposed those issue statements be modified as set forth in Attachment A to the joint motion. PFS notes with regard to basis one, however,

that it wishes to reserve the right to maintain that the issue of the lack of funds for storage cask decommissioning that is included in the language of the Attachment A revised issue statement is beyond the scope of contention Utah S as admitted.

The April 7, 2000 joint motion to approve the Attachment A stipulated language regarding the matters to be litigated under contention Utah S is granted. Further, concerning the dispute over the scope of contention Utah S relative to basis one, we request that on or before Wednesday, May 31, 2000, PFS provide a brief of no more than ten pages in length outlining its dispute with the State regarding basis one. Party responses to this PFS submission shall be filed on or before Wednesday, June 7, 2000, and are subject to the same page limitation.

II. May 8, 2000 Telephone Conference

Each party that plans to participate in the hearing should make a representative available to take part in a telephone conference beginning at 11:00 a.m. EDT (9:00 a.m. MDT) on Monday, May 8, 2000. We anticipate this conference will last approximately one hour. Counsel will be contacted by Licensing Board Panel personnel with conference call setup information.

In preparation for this prehearing conference, the Board requests that the parties consult with one another and

be prepared to provide a joint report (1) updating their previous estimates of how long they believe it will take to try each of the four issues listed above, including cross-examination and rebuttal testimony; and (2) providing suggestions about the order in which these issues should be tried, taking into account (a) the Board's April 19, 2000 notice of hearing describing the hearing days available, and (b) the Board's desire to minimize the number of hearing sessions that need to be closed because proprietary information may be involved.

Among the other administrative items that may be the subject of discussion at the telephone conference are the following:

A. Evidentiary Hearing

1. Prefiled testimony, exhibits, and stipulations.

Under the existing general schedule, prefiled testimony and premarked exhibits for a party's direct case, as well as any stipulations, are to be filed on or before Monday, May 15, 2000, and should be accompanied by a list of all direct case witnesses and exhibits. At the May 8, 2000 telephone conference, the parties should be prepared to provide the Board with an estimate of the number of witness statements and exhibits they anticipate prefiling for each issue. Additionally, they should be prepared to identify the type and number of any unusual exhibits, such as charts, computer

graphics, physical exhibits, etc., that they anticipate utilizing, and advise the Board whether they wish to have a rule on witnesses.

As we have noted previously, all intervenor exhibits should be marked numerically with the name of the sponsoring party (e.g., State Exh. 1); all PFS and staff exhibits should be marked alphabetically with the sponsoring party's name (e.g., PFS Exh. A; Staff Exh. BB). Parties should make an effort to coordinate before pre-filing exhibits to ensure that, if two parties wish to introduce the same document, it has only one designation. To have an exhibit admitted into evidence at the hearing, including those used on cross-examination, a party must (a) provide the court reporter with an original and two copies of the exhibit; and (b) to the extent they do not already have a copy, furnish a copy to each Board member and to each party that desires one. See 10 C.F.R. § 2.743(f).

In connection with the summary disposition motions that were filed by PFS for contentions Utah E/Confederated Tribes F and Utah R and the responses of intervenor State of Utah (State) and the NRC staff, the Board urges the parties' to utilize the supporting material facts statements as a basis for stipulations on factual matters not at issue in accordance with 10 C.F.R. § 2.753. Additionally, in the interest of time and efficiency, the Board asks that the

parties seek to arrive at additional stipulations on factual or other matters.

2. In limine motions and stipulations on admissibility of exhibits. Under the existing general schedule, party motions in limine regarding prefiled testimony and exhibits are to be filed on or before Wednesday, May 31, 2000. Party responses to those motions must be filed on or before Wednesday, June 7, 2000. The parties are encouraged to enter into stipulations regarding the admissibility of exhibits and the qualifications of other parties' expert witnesses. Exhibit stipulations will not be accepted by the Licensing Board, however, unless there is a showing in the party's prefiled testimony that clearly indicates the relevance of the particular exhibit to the contention involved.

3. Order of presentation. Although intervening parties bear the burden of going forward on their admitted contentions, applicant PFS bears the ultimate burden of proof relative to the sufficiency of its application. See 10 C.F.R. § 2.732. Nonetheless, in accordance with 10 C.F.R. § 2.731, the Board has determined that the following order of presentation will be used for each contention: PFS direct case and cross-examination; NRC staff direct case and cross-examination; intervenor direct case and cross-examination; PFS and/or staff rebuttal (if

any); intervenor surrebuttal (if any). The Licensing Board has concluded that it is more efficient for the intervenors to occupy the final place in the order of presentation for this hearing because PFS and the staff's positions on these issues are not dissimilar.¹

4. Cross-examination. In accordance with 10 C.F.R. § 2.743(b)(2), any party wishing to cross-examine a witness (or witness panel) must have available for the Board a cross-examination plan for that witness (or panel) that can be provided to the Board before the beginning of cross-examination. As is noted in that provision, all cross-examination plans requested by the Board will be held in confidence until after an initial decision on the contentions being litigated is issued.

In accordance with Commission policy, see Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981), the Licensing Board may limit unnecessary cross-examination in order to expedite the orderly presentation of each party's case. As was discussed in LBP-98-7, 47 NRC 142, 243 (1998), and at the September 8, 1999 prehearing conference, see Tr. at 1203, "lead parties"

¹ During the September 8, 1999 prehearing conference, staff counsel made the point that the staff prefers to be last in case it sees or hears something that causes it to change its position. See Tr. at 1197. Under the order of presentation we had adopted, if this occurs, staff counsel should advise the Board and we will consider whether an additional staff presentation is appropriate.

are to work together with any "involved parties," i.e., "any party that adopted a [lead party] contention, filed a contention that has been consolidated [with a lead party contention], or has opposed the same contention," to develop a common cross-examination plan, LBP-98-7, 47 NRC at 243. As was indicated by the Licensing Board in the September 8, 1999 prehearing conference, the lead party for a contention will bear the primary responsibility for cross-examination. See Tr. at 1199-200. However, if there is a disagreement among the "lead" and "involved" parties regarding cross-examination, this arrangement does not preclude an involved party from seeking to conduct separate cross-examination under the appropriate circumstances. See LBP-98-7, 47 NRC at 243 n.29. Moreover, a non-lead/involved party may seek to conduct witness cross-examination, assuming it can make a showing through its cross-examination plan that its examination will not be repetitious of the examination conducted by lead/involved parties.

D. Other Agenda Items

Parties wishing to propose other items for the agenda of this telephone conference should advise the Board and the other parties of those matters in writing no later than 1:00 p.m. EDT (11:00 a.m. MDT) on Friday, May 5, 2000.

Any questions regarding the matters discussed in this issuance should be directed to the Board Chairman at (301) 415-7454.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD²

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

May 1, 2000

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING JOINT MOTION TO APPROVE STIPULATION ON CONTENTION UTAH S AND OUTLINING ADMINISTRATIVE MATTERS) have been served upon the following persons by deposit in the U.S. mail, first class, except as otherwise noted (by *) and in accordance with the requirements of 10 CFR Sec. 2.712.

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LB MEMORANDUM AND ORDER
(GRANTING JOINT MOTION TO APPROVE
STIPULATION ON CONTENTION UTAH S
AND OUTLINING ADMINISTRATIVE MATTERS)

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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of May 2000

* Internal Distribution