UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

SERVED 03/22/02

Before Administrative Judges:

Michael C. Farrar, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel Storage Installation)	March 22, 2002

PREHEARING MEMORANDUM: SUMMARY AND ORDER

We noted in our Prehearing Memorandum and Order of December 26, 2001 ("Dec. 26 Memo"), that the Commission's policy directives concerning hearing management [1] encourage us "to use all available tools in order to achieve the goals of producing an informed adjudicatory record in a reasonable, disciplined time frame while providing a fair hearing process." We went on to indicate that "to that end, we think that given the complexity of some of the issues before us here there is need -- and room -- for more than the usual creativity in managing the process leading up to the hearing." Without there suggesting "whether or not they would be appropriate in other proceedings," we announced certain prehearing measures "necessary to achieve those ends" in the circumstances presented here. Dec. 26 Memo, pp. 1-2.

During the nearly three intervening months, we have, with the parties' assistance and cooperation, refined those measures in two prehearing conferences (held January 17 and February 6) and in written communications; we have also used those occasions to set schedules and to manage other aspects of the proceeding. Now, as we approach the start of

[1] See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), and Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998).

the hearing, it is timely to summarize for the record those prehearing measures and the parties' response thereto. Those are covered in paragraphs 1-2 below.

More importantly for present purposes, with the nature of the matters before us recently focused through settlement discussions and other developments, certain pending items related to the hearing warrant consideration now, particularly insofar as they call for the parties' responses or cooperative efforts. Those matters, to which we commend the parties' close attention, are covered in paragraphs 3-8 below.

1. In LBP-01-39 (54 NRC 497, 521), issued the same day as the Dec. 26 Memo, we directed the State and the Applicant -- for reasons there stated -- to work together to file a "unified geotechnical contention." They did so on January 16, in admirable fashion, for which the Board is appreciative.

We also requested, in the Dec. 26 Memo (p. 2), that for that same issue the parties confer and file, by January 31, 2002, "either a joint statement of the facts (at whatever level) not in dispute or a similar stipulation of matters which are not in controversy." Again, the parties did so, even though it had by then been agreed that, as to other issues, attempting to reach stipulations was not likely to be a productive exercise. Tr. 2819-20.

2. Anticipating some very complex pre-filed testimony on at least two contentions, we took three steps that we anticipated would enable us better to review and to analyze that testimony and to prepare to pursue probing questions at the hearing. [2]

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[2] We explained in the Dec. 26 Memo (p. 3) that the main purpose of these steps and others was " to provide us with as much insight as possible, as early as possible, into the key aspects of the hearing. That insight will enable us to study the pre-filed testimony having in mind, on the one hand, its underlying purpose and strengths as seen by the testimony's proponent and, on the other hand, its weaknesses as perceived by those who will challenge it, as well as an appreciation of where the respective parties want their presentations to take us. We expect that this insight will aid materially in preparing us for the hearing, as well as put us in better position to ensure that the hearing itself sets the stage completely for our final decision." We recognized, however, that some of the measures had the potential to reveal trial strategy prematurely to an opponent, and accordingly sought the parties' views on that score, which were provided at the January 17 conference. Dec. 26 Memo, fn. 4.

a. The first step was to direct the parties to file for each contention "a concise outline of the key determinations that (as best they can foretell) they will be asking us to make post-hearing." Dec. 26 Memo, p. 2. We spent some time at the January 17, 2002 prehearing videoconference explaining and refining what was needed on that score, and why, and discussing the implications (or lack thereof) to a party's case if that filing or others omitted matter that later proved significant. Tr. 2761-62, 2768-84, 2786-87. At this juncture, our preliminary review of the pre-filed testimony on "credible accidents" and on the two remaining environmental issues leads us to commend the parties for their preparation of the "key determinations" outlines, which were prepared in a fashion that serves precisely the purposes we had in mind.[3] We have every confidence that our having those documents in hand will produce a more complete record in a more efficient manner, which in turn should promote the ready preparation of a decision that addresses all the issues thoroughly.[4]

b. The second such step involved directing the parties to preface each witness' pre-filed testimony with "a brief outline . . . , prepared by counsel, of what the party hopes to prove through that witness." Dec. 26 Memo, p. 2. Again, the purposes of this measure were discussed at the conference. Tr. 2759-68.[5] From what we have seen thus far, the parties carried out this assignment well; the comments we made about their efforts in ¶ 2a, above,

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[3] At the conference, it was stressed that, in order to make their preparation as little burdensome as possible, these documents should be in the form of outlines, not narratives (Tr. 2783); should not include supporting argumentation (Tr. 2777) or citations to the underlying testimony (Tr. 2771-72); and should have their length limited commensurate with the complexity of the contention (in this instance, a maximum of five pages for the seismic contention, three pages for the "accidents" contention, and 1 to 1 ½ pages for other contentions, Tr. 2781).

[4] As we explained at the time (Dec. 26 memo, p. 3), our goal was -- and remains -- to adopt and follow "procedures that promote thoroughness, efficiency and fairness," a goal toward which we elicited the parties' cooperation, which they have provided in full measure.

[5] Although we had indicated that each of those documents should be "no more than one page long," at the January 17 prehearing conference it was set at one or two pages depending on the complexity of the testimony. Tr. 2761.

apply here as well. We would add only that judicious use of the two measures just discussed will be most important with respect to the upcoming filing of the geotechnical testimony, due on April 1, and we look forward to receiving the benefit of the parties' efforts in that regard as well.

c. The third step stemmed from our concern that a customary practice -- of submitting the requisite "cross-examination plan" (see 10 C.F.R. § 2.743(a),(b)(2)) to Boards on the eve of, or minutes before, the appearance of the witness -- deprived Boards of the opportunity both to reexamine the pre-filed testimony in light of the plan and to prepare to enforce the plan if counsel went astray. To address that concern, we set out in our Dec. 26 Memo a two-stage process for putting such plans before us. Specifically, we called (p. 2) for "a preliminary version two weeks in advance of the hearing of the contention, and a more detailed version the day before the witness is scheduled to testify." Convinced by the parties, however, at the January 17 prehearing conference of the hardship this would impose on them, and believing that their counterproposal would allow us to accomplish our goals, we agreed that they need supply only one version of the cross-examination plan so long as that were done (earlier than has been customary) at the close of a hearing day for witnesses to be heard two days later (for example, late on Wednesday for a Friday witness, with Friday permissible for a Monday witness). Tr. 2787-95. This practice will be followed throughout the upcoming hearing.

3. Much time was spent on scheduling the hearing, to allow for the availability of witnesses, the accessibility of suitable space in Salt Lake City (the State objected strenuously to our suggestion that we begin the hearing a week early at our Rockville hearing room, Tr. 2728-31), the uncertainty of the time needed for each contention, and the indetermination as to which contentions might need to be heard (in light of settlement discussions and pending summary disposition motions). See Feb. 6 Transcript and subsequent Feb. 6 Memorandum.

a. We need not detail all the factors that went into shaping the schedule that eventually emerged. It suffices to note that, to preserve all options, we set aside not just the

three weeks originally contemplated but a total of six weeks, beginning Monday, April 8 and continuing as late as Friday, May 17, if necessary, including at least one and as many as three Saturday sessions.

A controlling aspect for scheduling was witness availability on the safety issues. To accommodate that factor, the parties agreed that, regardless of how the rest of the schedule was shaped, the first week (beginning April 8) was to be devoted to Contention Utah K, "credible accidents," and the fourth and fifth weeks (beginning April 29 and May 6) to Contentions Utah L and QQ, "geotechnical and seismic stability." [6]

As it turned out, two of the four environmental issues that were pending at the time of the prehearing conferences have been removed from the hearing process. One, the "ecology and species" contention (Utah DD) involving the peregrine falcon, has been settled (see Joint Motion for Dismissal, March 15, 2002). Another, environmental justice (Contention OGD O), partially survived a summary disposition motion (LBP-02-08, February 22, 2002) but had further proceedings stayed in connection with the Commission's taking early review of the matter (CLI-02-08, March 7, 2002).

b. We have since received, on March 18, the pre-filed testimony on the two remaining environmental issues upon which evidence is to be heard -- Utah O, "hydrology," and SUWA B, "rail-line alternative". We have also recently announced that we will be conducting oral argument on the admissibility of a "late-filed" contention, Utah SS, challenging aspects of the cost-benefit balance in the FEIS, published in January, 2002 (Notice of Oral Argument, March 13, 2002).

Based on the advice the parties previously provided, and on our review of the prefiled testimony, we believe that those three environmental matters can be heard in three days,

[6] These items formed the core of the schedule which was eventually published formally in our March 1 Notice of Hearing (67 Fed. Reg. 10448, March 7, 2002).

beginning on Tuesday, April 23 and continuing through Thursday, April 25 (the parties will recall that hearing space was not available on Friday, April 26 and that the Tooele limited appearance sessions are to be held that afternoon and evening). We therefore DIRECT the parties to confer on witness availability and to provide us, at their earliest convenience, a proposed three-day schedule for the evidentiary hearing on the two admitted contentions and the oral argument on the pending contention.[7] The Board will be guided by the parties' preferences as to scheduling witnesses on these matters for those three days; the oral argument can take place at any open time that remains.

4. With respect to that oral argument (on the admissibility of Contention Utah SS), we ALLOT a total of 90 minutes. For their main arguments, each side will have 30 minutes: the State, as the moving party, will have 20 minutes to open and 10 minutes for rebuttal; the Applicant will have 15 minutes for its reply, followed by the NRC Staff, also with 15 minutes. In addition, in order to clarify at the outset certain aspects of the record with the aim of making the rest of the argument more informative and productive, the Board may have some factual questions to pose to the Applicant and Staff before the State begins its argument. Those questions would, we expect, take at most 10 minutes. Depending on the nature of those questions and the answers thereto, the State may be provided a corresponding amount of time to be added to its opening. In any event, the argument should be completed in no more than the 90 minutes being set aside for that purpose.

5. As has been formally announced, the hearing will begin at 9:00 AM on Monday, April 8. In line with the discussion at the February 6 prehearing conference (Tr. 2878), each party is

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[7] As this Memorandum was being prepared, we received (on the evening of March 21) an email communication from counsel for the Applicant, on behalf of all parties, regarding scheduling. Except with respect to the starting date of the environmental matters, which the parties need to revisit in light of our thoughts herein, the scheduling matters the parties have agreed to are acceptable to the Board, and we again compliment them on their ability to cooperate on such matters.

to make an opening statement addressed to its overall approach to the proceeding and, in the case of the three parties which submitted pre-filed testimony on the "credible accidents" issue being heard that week, its position on that issue as well.

In light of the parties' differing degrees of active participation and involvement in the two safety and two environmental issues to be heard, and the nature of their positions (if any) on those issues, the order and timing of the opening statements will be as follows (see Tr. 2878): the Applicant, then the NRC Staff, shall proceed first, each having 25 minutes, followed by the State, having 25 minutes, and SUWA, having 10 minutes. The Skull Valley Band, the Confederated Tribes and OGD will each have 10 minutes, with the Band having the option to speak either after the Applicant or after SUWA. With introductions and the Board's opening remarks, the opening statements should thus be completed in slightly over two hours.

Judge Bollwerk, whose Board has retained jurisdiction over a part of the proceeding and who will be in attendance on the opening day to hear the limited appearance statements, requests that following the close of the morning session each of the parties have someone available for a discussion regarding Electronic Information Exchange. For planning purposes, then, barring unforeseen circumstances or the need to address late-breaking matters, all these activities should be concluded before the noon target time. As previously indicated, limited appearance sessions will be held later that day, from 2:00 - 5:00 PM and 7:00 - 9:30 PM.

6. At the prehearing conferences and in follow-up communications, we discussed the advisability of the Board making a site visit accompanied by the parties. Tr. 2755-58. Given the manner in which the schedule has evolved and the fact that they had previously been to the Skull Valley Reservation (albeit not to the new rail junction), Judges Kline and Lam have decided to forego a site visit. Judge Farrar does, however, want to participate in a site visit, and suggests Monday, April 15, for that purpose, a date that had previously been discussed (Tr. 2887 and Feb. 8 email). As a first step in that regard, counsel for the Skull Valley Band should

promptly reconfirm whether that date is acceptable to the Band and advise the Board and the parties. At that point, the other parties are to inform us as to whether they wish to have a representative on the site visit. (Given that no other Board members or Board staff will be accompanying Judge Farrar, the parties may need to have only one representative each on the trip.) After we have a count of attendees, we will discuss arrangements, bearing in mind that the parties had suggested at the prehearing conference the benefit of all attendees traveling in the same vehicle rather than in a caravan. Tr. 2907-08.

7. The time for replying to any in limine motions that may be filed will remain at seven calendar days, as was provided earlier in the proceeding.

8. Pre-filed testimony on the geotechnical contentions is due for submission on Monday, April 1. Given the likely voluminous nature of that testimony and accompanying Exhibits, and the Board's travel plans, the parties are DIRECTED to serve the Board's official (hard) copy of those filings not by regular mail but by overnight delivery service or local courier. (If the parties so wish, those making filings may agree among themselves to serve each other hard copy in that same fashion.)

Accordingly, on this 22nd day of March, 2002, this summary of the prehearing measures thus far followed is placed on the record, and it is ORDERED that the additional measures set out herein are ADOPTED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Rockville, Maryland
March 22, 2002

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

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, OGD, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State of Utah; and (3) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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(Independent Spent Fuel Storage Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB PREHEARING MEMORANDUM: SUMMARY AND ORDER have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Dated at Rockville, Maryland,
this 22nd day of March 2002