

April 30, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

May 6, 2003 (9.09AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
)
PRIVATE FUEL STORAGE L.L.C.)
)
(Private Fuel Storage Facility))

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

**SECOND JOINT REPORT
ON "CONSEQUENCES" PROCEEDINGS**

The parties file this second Joint Report on the "Consequences" proceeding. In the first Joint Report filed March 31, 2003, Private Fuel Storage, L.L.C. ("PFS") stated its intent "to exercise the 'option' made available" by the Atomic Safety and Licensing Board ("Board") in the Board's Partial Initial Decision (Regarding Credible Accidents), LBP-03-04, 57 N.R.C. ____ (March 10, 2003) for a "consequences proceeding".¹ Since the last report, PFS has developed a better idea when the underlying technical analyses are likely to be completed and is therefore in a better position to discuss the schedule for litigating consequences at this time. Further, there is a dispute among the parties as to how to proceed with respect to the consequences proceeding which dispute the parties agree should be resolved at this point in time. Accordingly, this Second Joint Report sets forth the respective positions of the parties on further proceedings on the consequences issue with respect to both (1) the process by which those additional proceedings should be instituted and undertaken, and (2) the schedule for such additional proceedings.

¹ Joint Report on "Consequences Proceeding," (March 31, 2003) ("First Joint Report") at 2 citing LBP-03-04, slip op. at 88.

A. PFS's Position

1. The Process for Undertaking the "Consequences Litigation"

Based on statements in the Board's March 10, 2003 Partial Initial Decision,² the State in the First Joint Report took the position that the "consequences" issue is not pending before the Board and that PFS must first file a license application amendment that would then need to undergo formal Staff review before the issue of consequences would enter the hearing process. First Joint Report at 2-3. Specifically, the State claims that (1) the issue of consequences is not now before the Board, and will not be until PFS files a formal license amendment, and State raises a formal contention before the Board concerning such an amendment, and (2) that the amendment must undergo formal Staff review, analysis, and issuance of an SER before going to hearing before the Board. *Id.* Neither PFS nor the Staff took a position on this issue in the First Joint Report. *Id.* at 2

PFS respectfully submits that neither the filing of a license amendment nor formal Staff review of a licensing amendment application with potential "Requests for Additional Information" and issuance of a Safety Evaluation Report is necessary for the Board to hear the consequence issue. It is wholly permissible for the Staff to present its position on a particular issue for the first time in testimony in an adjudicatory licensing proceeding. This often occurs with respect to issues that are adjudicated in the course of such proceedings.³

Moreover, the law is clear that an atomic safety and licensing board is not empowered to tell the Staff how it is to conduct its review of an issue, for the functions of

² Although the Board indicated in the Partial Initial Decision how the consequences issue could be brought to hearing, PFS does not understand the Board to have made a ruling as to how the consequences "must" be brought to hearing.

³ See Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-343, 3 NRC 169, 199-206 (1976) (resolving Board concerns about steam generator integrity and failure consequences based on Applicant and Staff testimony and associated documents); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 865-866 (1984) (proceeding with hearing prior to Staff issuing its report); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-86-28, 24 NRC 263, 273-275 (1986) (Board resolves issue on geology/hydrology left open in Safety Evaluation Report).

the Staff and the Board are wholly independent and separate.⁴ Nor is the adequacy of the Staff's review the issue before the Board. Rather, the issue to be decided by the Board is whether the prerequisites for the issuance of a license have been met.⁵ In this respect, a licensing board may resolve a challenge raised by an intervenor without the Staff having taken a position on the issue. Such has already occurred in the present case.⁶ Likewise, the Staff need not review or analyze evidence developed by an applicant before a licensing board can rely upon it.⁷

Further, the Board has acknowledged that accident probability and consequences are part of the same ultimate question, *i.e.* – “the probability of an accident that would lead to radiation doses beyond Part 100.” LBP-03-04, slip op. at 80. In this respect, the Board rejected PFS's testimony on potential cask penetration because the issue of consequences had not been sufficiently developed for hearing, not because the issue of consequences itself was beyond the scope of the contention. *Id.* at 84-88. As the Board recognized, either the probability of an accident, or the consequence of an accident, or both, may be the focus of answering this ultimate question. *Id.* at 80-81. The Board has suggested that PFS may want to pursue consequences of an accident simultaneously with any appeal of its March 10, 2003 Partial Initial Decision on Accident probability. *Id.* at 88-91. While PFS continues to believe that its license application is sufficient as it stands

⁴ Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1113 (1981); Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194 (1978). *Cf.* Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 806-807 (1983).

⁵ The Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 121-22 & n.67 (1995); *see also Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process*, 54 Fed. Reg. 33,168, 33,171 (1989).

⁶ For example, the Licensing Board granted PFS summary disposition on the cruise missile issue even though the Staff took no position on the issue because it had not completed its review. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-19, 53 NRC 416, 424-429 (2001), NRC Staff's Response to Applicant's Motion for Summary Disposition of Utah Contention K and Confederated Tribes Contention B (Jan. 30, 2001) at 8 and n.6, n.8..

⁷ *See, e.g., Tennessee Valley Authority* (Yellow Creek Nuclear Plant, Units 1 and 2), LBP-78-7, 7 NRC 215, 219 n.7, 242 n.18 (1978).

and that the issue of consequences need not be reached, PFS agrees with the Board's suggestion that it would be most expeditious and efficient to pursue litigation of the consequences issue in parallel with the Commission resolving PFS's (and the Staff's) appeal of the Board's March 10, 2003 Partial Initial Decision.⁸

Therefore, the Board and the parties should proceed with the litigation of consequences without formal license amendment and Staff review, given the Board's determination in its March 10, 2003 Partial Initial Decision (the subject of petitions for review filed by both PFS and the Staff) that the "probability" issue does not "moot the need to consider 'consequences'" LBP-03-04, slip op. at 87.⁹

2. Proposed Schedule for the Consequences Litigation

PFS proposes the following schedule for litigating the consequence issue:

| | |
|---|----------------------|
| Discovery | 06/27/03 to 08/22/03 |
| PFS Expert Report(s) and Backup Provided as part of Discovery | 06/27/03 |
| Staff and State Expert Report(s) and Backup Provided as part of Discovery | 07/25/03 |
| Expert Depositions Conducted as part of Discovery | 08/11/03 to 08/22/03 |
| Filing of Pre-Filed Direct Testimony | 09/12/03 |
| Filing of Motions In Limine | 9/22/03 |
| Responses to Motions In Limine | 09/29/03 |

⁸ In accordance with 10 C.F.R. § 72.70, PFS will update at the appropriate time its Safety Analysis Report to reflect any changes in the licensing basis for the PFS facility as developed and determined through the licensing hearing process.

⁹ The State suggests in note 12 *infra* that U.S. Army (Jefferson Proving Ground Site), LBP-01-32, 54 NRC 283 (2001) mandates a different course of action here. That case is, however, dissimilar in several key respects. These include the fact that the case was a Subpart L proceeding in which the Staff which was not a party and that the applicant there was agreeable to holding the proceeding in abeyance as opposed to its outright dismissal.

| | |
|--|----------------------|
| Hearing | 10/06/03 to 10/17/03 |
| Simultaneous Findings | 11/07/03 |
| Simultaneous Reply Findings | 11/21/03 |
| Board Decision (60 day Commission Guideline) | 01/21/04 |

Under this proposed schedule, the parties would provide each other their respective expert reports by the dates specified in the proposed schedule together with the backup to the report (references, supporting calculations etc) that are subject to the discovery process. The backup would be provided at the same time as the expert reports to expedite the discovery process. Depositions of experts and other potential witnesses would be conducted during the last two weeks of the discovery period to allow time for review of the expert reports and related backup prior to the depositions. Because the focus of the discovery process would be the expert reports, PFS believes that there should be little need for additional discovery beyond the expert reports and depositions of experts and any other potential witnesses, and therefore the same limitation on interrogatories should be put in place with respect to previous discovery. Under this limitation, no party may serve more than ten interrogatories, including all discrete subparts, on any other party.¹⁰ A similar limitation should be imposed with respect to Requests for Admissions in order to avoid burdensome written discovery that would better and more efficiently be accomplished through the depositions of the parties' respective expert witnesses. Thus, PFS proposes that no party be allowed to serve more than ten Requests for Admissions, including all discrete subparts, on any other party.

In light of September 11th, there are potential security concerns about litigating the consequences issue which may require secure treatment of certain information and materials and could require closed hearings at least in part. PFS and the other parties are

¹⁰ See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 245 (1998).

reviewing this potential need for security and will advise the Board further of any potential security requirements in this regard at a later time.

PFS has discussed the above proposed schedule with counsel for the Staff and for the State. The Staff has proposed a different schedule below, and the State believes that it is premature to discuss schedule at this time. PFS believes that the above proposed schedule is appropriate for litigating the consequences issue subject to confirmation by the parties at a later date (for example at the May 29, 2003 oral argument on PFS's Motion for Reconsideration) that the expert reports are on a course so as to support the proposed schedule. The Board will have more information available based on the further report that the Staff suggests be filed May 16, 2003, and PFS proposes that the subject of schedule for the "consequences" litigation be discussed at the May 29 oral argument that the Board has scheduled on PFS's Reconsideration Motion.¹¹

B. NRC Staff Position

The NRC Staff is considering whether to perform an independent analysis of the consequences of an F-16 crash into the proposed PFS facility, which would be performed by an NRC contractor. Discussions concerning this matter are in progress at this time, and a contract has not yet been executed. The Staff expects to be able to inform the Licensing Board and parties as to whether such an independent analysis will be performed, and the schedule for publication of the results of any such analysis, on or before May 16, 2003. For planning purposes, the Staff proposes the following schedule, recognizing that these dates are tentative at this time and could change as developments proceed.

Proposed Schedule:

| | |
|--|---------|
| Parties report as to whether they will conduct crash analyses | 5/16/03 |
| Document production by PFS (including publication of analysis) | 6/30/03 |
| Document production by other parties (including analyses): | 8/15/03 |

¹¹ PFS notes that it has not provided for summary disposition in its proposed schedule above, but if a more drawn out schedule, such as that proposed by the Staff, were adopted PFS would consider the filing of a summary disposition motion.

| | |
|---|------------|
| Completion of all discovery: | 9/26/03 |
| Written testimony to be filed: | 10/24/03 |
| Motions in limine to be filed | 11/7/03 |
| Responses to motions in limine | 11/17/03 |
| Ruling on motions: | 11/26/03 |
| Evidentiary hearings: | 12/1-12/03 |
| Proposed findings of fact and conclusions of law: | 1/23/03 |
| Reply findings and conclusions: | 2/20/04 |
| Initial Decision | 4/20/04 |

Further, the Staff notes that in light of the events of September 11, 2001, litigation of the crash consequence issue is likely to require treatment as safeguards information and/or National Security Information, in order to avert the unauthorized disclosure of “sensitive unclassified” or classified information. All parties should keep this in mind in their discussions and documentation of facts, analyses and opinions concerning this issue. A determination that material should be treated as National Security Information could impact the schedule.

With respect to the dispute between the Applicant and the State of Utah (State) as to whether the crash consequence issue is now properly before the Board, and whether an amendment to the license application is required to include analyses regarding the consequences of an F-16 crash into the proposed facility, the Staff expresses the following views. First, the Staff notes that the Licensing Board appears to have ruled, in LBP-03-04, that the consequence issue is encompassed within Contention Utah K. See slip op. at 84. In light of that ruling, from which no party has appealed, this determination now appears to be the law of the case. Second, the Staff has concluded that an amendment to the license application would be required at such time as the Applicant revises its proposed licensing basis to include reliance on such analyses; however, no amendment is required until the Commission rules upon the probability issues raised in the Applicant’s and Staff’s petitions for review of LBP-03-04 and PFS determines that it wishes to revise its licensing basis to include reliance on a consequence analysis. In the event that PFS revises its licensing basis to include reliance upon a consequence analysis, no further dis-

covery or litigation should then be required except insofar as PFS seeks to rely on materials other than those which have been, or are being, litigated before the Licensing Board.

C. State of Utah Position

In LBP-03-4, slip op. at 91 and 219, the Board requested that the parties submit a joint report “outlining their positions regarding further proceedings on the issue of consequences of an F-16 accident at the Skull Valley facility.” At the time of the March 31, 2003, first joint report, the State was unable to suggest anything definite, noting that its “future actions will be dependent on the timing and substance of PFS’s license application amendment.” Even though 30 days has passed since the filing of the first joint report, nothing further has transpired to assist the State in assessing further proceedings.

Preliminary to the development of any schedule, the present status of the case must be acknowledged by all parties. PFS and the Staff do not acknowledge what appears to the State to be clear rulings made by the Board on the current status of the case, those being:

1. PFS must assemble a license application amendment (LBP-03-04, slip op. at 88 and n. 130). More particularly, the Board stated: “That matter [consequences] is not now before us . . . If the Applicant were to rehabilitate its application by addressing that issue fully, this matter might eventually come before us again, this time with the benefit of Staff analysis.” *Id.* at 3.

PFS’s position is that it can forego the license amendment process and commence the pre-hearing process simply by producing of an expert report.

2. PFS’s license amendment must undergo Staff review and analysis before re-entering the hearing process. *Id.* at 3, 88 and n. 130.

PFS’s position is “it is wholly permissible for the Staff to present its position on a particular issue for the first time in testimony in an adjudicatory licensing proceeding.”

3. The State will be given the opportunity to participate “[a]ssuming the State is able to show, in a then-timely fashion, that it meets the procedural and substantive ground rules for such participation.” *Id.* at 88 and n. 131. This issue appears to squarely address the need for the State to file a contention.

PFS states that the issue of consequences itself was not beyond the scope of the contention.

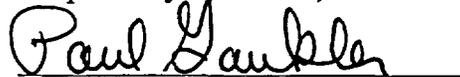
PFS's position is contrary to the Board's in limine ruling (referred to in slip op. at 84) that "the way the contention was framed it just dealt with probability . . ." Tr. 3008.

The Board has ruled that PFS must file an amended application for Staff review and analysis,¹² followed by timely participation by the State (*i.e.*, a new contention) – steps that PFS and the Staff say are unnecessary. PFS's and the Staff's unwillingness to acknowledge the Board's ruling results in a case status completely different from what the Board described in LBP-03-04. The State, therefore, requests direction from the Board on the required actions to bring the matter of consequences before the Board for hearing. In sum, until the necessary submissions to be made by the parties are known, a schedule cannot be developed.

* * * * *

The parties suggest that the above topics be discussed at the oral argument that the Board has scheduled on May 29, 2003 with respect to PFS's Motion for Reconsideration of the Board's March 10, 2003 Partial Initial Decision Regarding Credible Accidents.

Respectfully submitted,



Jay E. Silberg
Paul A. Gaukler
D. Sean Barnett
SHAW PITTMAN, LLP
2300 N Street, N.W.
Washington, DC 20037
(202) 663-8000
Counsel for Private Fuel Storage L.L.C.

April 30, 2003

¹²In the State's view, the Staff's primary role is not that of a litigant. Rather, the Staff's role is to first satisfy itself in a pre-hearing review that the license application (and amendments) pass muster with respect to safety and in protecting the public. LBP-03-04, slip op at 9-10. Here, PFS has not submitted any new information to the Staff on consequences.

In a similar case, where a licensee proposed a dramatically different plan from the one before the licensing board, the board held the hearing in abeyance until Staff had completed its review before the matter re-entered the hearing process. See U.S. Army (Jefferson Proving Ground Site), LBP-01-32, 54 NRC 283 (2001).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)
)
PRIVATE FUEL STORAGE L.L.C.) Docket No. 72-22
)
(Private Fuel Storage Facility)) ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the Second Joint Report on "Consequences" Proceedings were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 30th day of April, 2003.

Michael C. Farrar, Esq., Chairman
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: MCF@nrc.gov

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: PSL@nrc.gov

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications
Staff
e-mail: hearingdocket@nrc.gov
(Original and two copies)

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: JRK2@nrc.gov; kjerry@erols.com

*Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

* Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Catherine L. Marco, Esq.
Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: pfscase@nrc.gov

John Paul Kennedy, Sr., Esq.
David W. Tufts, Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84105
e-mail: dtufts@djplaw.com

Diane Curran, Esq.
Harmon, Curran, Spielberg &
Eisenberg, L.L.P.
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
e-mail: dcurran@harmoncurran.com

Paul EchoHawk, Esq.
Larry EchoHawk, Esq.
Mark EchoHawk, Esq.
EchoHawk PLLC
P.O. Box 6119
Pocatello, ID 83205-6119
e-mail: paul@echohawk.com

* By U.S. mail only

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancellor@utah.gov

Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East
Suite F
Salt Lake City, UT 84105
e-mail: lawfund@inconnect.com

Tim Vollmann, Esq.
Skull Valley Band of Goshute Indians
3301-R Coors Road, N.W.
Suite 302
Albuquerque, NM 87120
e-mail: tvollmann@hotmail.com


Paul A. Gaukler