

June 19, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

**JOINT REPORT ON PROPOSED SCHEDULE FOR
LITIGATION OF THE "CONSEQUENCES" PROCEEDING**

In accordance with the May 29, 2003 prehearing conference order of the Atomic Safety and Licensing Board ("Board"),¹ the parties file this Joint Report on the schedule for litigating the "consequences" aspects of the air crash issue. In a Memorandum and Order dated May 28, 2003, the Commission directed the Board to proceed "expeditiously on the consequences aspect of the air crash issue, with a view toward resolving it no later than the end of 2003." CLI-03-05, Slip op. at 10. In light of the Commission's directive, at the May 29, 2003 prehearing conference the Board set the last two weeks of September (Monday September 15, 2003 to Friday September 26, 2003) as a tentative target date for the "consequences" hearing. Tr. at 13915-16. Counsel for the parties have discussed the schedule in light of these parameters and have been successful in reaching agreement in large part on many of the issues involved in developing such a schedule, There are, however, several matters, set forth below, on which the parties have not reached full agreement, and a conference call has been set for Wednesday June 25, at 11:00 AM EST for the parties to discuss these matters with the Board.

¹ Per the prehearing conference order, the parties were to file this joint report June 18, 2003. Tr. at 13915. In a conference call between Judge Farrar and the counsel for the parties on June 18, 2003, the date for filing this report was extended to June 19, 2003.

A. Potential Treatment of PFS's Expert Reports and Related Information as Safeguards Materials

1. Overview and Position of NRC Staff and PFS

As discussed at the May 29, 2003 prehearing conference, there is the potential that certain of the technical information developed for litigating "consequences" may be considered as "Safeguards Information." The NRC Staff has requested PFS to file its expert reports based on the assumption that they do contain safeguards information in order to allow the Staff an opportunity to review and determine whether in fact the reports do contain safeguards information.² The NRC Staff intends to conduct this review on an expedited basis and expects to complete its review by July 11, 2003.

Pending completion of the Staff's review, PFS's expert reports would need to be handled as if they contained safeguards information. The NRC Staff may determine that all, none or selected parts of the reports constitute safeguards information. In this respect, PFS is attempting to develop and prepare its expert reports such that they do not contain safeguards information. To the extent, however, that the Staff determined that all or selected portions of the reports contained safeguards information, the reports or the selected portions thereof would need to be handled by the Board and the parties as containing safeguards information.

As discussed by the State in subsection A.2 below, the State is concerned that treating the reports as containing safeguards information would place an intolerable burden on the proceeding and make it impossible to develop any schedule that could meet

² As provided for by the Board at the May 29, 2003 prehearing conference (Tr. at 13911), PFS advised the State earlier this week that it intends to file expert reports regarding "(1) characterization of possible F-16 aircraft crash impacts (velocity and angle of impact) in Skull Valley, (2) assessment of the effects of an F-16 or jettisoned ordnance impact on the spent fuel storage casks and the canister transfer building, (3) assessment of the effects of a jet fuel fire on the spent fuel storage casks and the canister transfer building, and (4) evaluation of the likelihood for an F-16 or jettisoned ordnance impact to cause the release of radioactive material." PFS has also advised the State of the names of the experts it has engaged to prepare these reports. From this information the State should be able to identify its witnesses at this point in time.

the Commission's directive for litigating and resolving the consequences issue by the end of the year. The State raises two concerns, first, potential delay by its counsel and experts in receiving copies of PFS's reports while the Staff is determining whether the reports contain safeguards information, and, second, to the extent that all or parts of the reports are determined to contain safeguards information, difficulties associated with the handling safeguards information during the course of the proceeding. The State proposes instead that PFS's expert reports and related information developed in the "consequences" proceeding be handled in the same manner as PFS confidential proprietary information has been handled in the case. Under the State's proposal, access to PFS's expert reports and related technical information would be limited to counsel and consultants on a need to know basis, but such reports and information could be discussed over the telephone and be transmitted electronically.

The Staff and PFS believe that the State's concern regarding access to PFS's expert reports can be remedied by handling the reports in accordance with the Protective Order that the Board put in place for litigating the State's contentions concerning PFS's security plan.³ Under the Protective Order, access to safeguards information was limited to PFS and State counsel, consultants, and other support personnel (e.g. secretaries) who had a need to know such information. Before any person with a need to know could be provided access to safeguards material, he or she needed to execute a non-disclosure affidavit agreeing to protect and handle the information as safeguards material and their access to safeguards material need to be approved by the Licensing Board. The Board's Protective Order identified specific PFS and State counsel, consultants and support personnel authorized to have access to safeguards materials, subject to the requirements of

³ Memorandum & Order (Protective Order and Schedule for Filing Security Plan Contentions), Dec. 17, 1997 as modified by Memorandum & Order (Protective Order Amendment), Dec. 22, 1997 and Memorandum & Order (Additional Amendments to Protective Order), Dec. 23, 1997.

the Order, with provisions for the parties to request the Board to add additional persons to the list of those authorized to have such access.

PFS and the Staff propose that such a process be adopted and implemented next week such that PFS could provide copies of its consequences reports to the State and its consultants at the same time PFS provides them to the Staff. This would require (1) the Board to adopt its earlier protective order for the handling of safeguards information related to the consequences proceeding, (2) the State (and PFS) to identify counsel, consultants and support personnel that need to have access to such information, (3) the Board to issue an order authorizing these persons to have access to such information in accordance with the terms of the protective order, and (4) the execution by these persons of the non-disclosure affidavit required by the protective order. Given the pre-existing protective order in this case, PFS and the Staff believe that such a process could be implemented next week which would allow the State and its consultants to receive PFS's expert reports at the same time as they are submitted to the Staff.

Should the NRC Staff determine that all or some parts of PFS's reports in fact contain safeguards information, it would be necessary to follow the special procedures set forth in the protective order with respect to such information. Neither the Staff nor PFS believe, however, that these procedures would prevent completing the consequences litigation by the end of the year.⁴

The primary reason that the parties requested a telephone conference with the Board next Wednesday is to discuss and resolve this matter, at least to such an extent that PFS can provide copies of its reports to the State simultaneously with their submission to the Staff.

⁴ In this respect, PFS and the Staff disagree with the State's many assertions made in its statement of position below that the compressed schedule unfairly hampers its ability to adequately develop and put on its case.

2. State of Utah's Position

In CLI-03-05, relying on its inherent supervisory power over licensing proceedings, the Commission directed the Board "to make every effort to wind up the consequences hearing no later than December of this year." CLI-03-05, slip op at 6. Given this directive, the Board tentatively set the consequences hearing for September 15 through 26, 2003.

While the State understands that the Board is being responsive to the Commission's instruction, the State, here, raises its objections to the lack of due process for the consequences proceedings. Discovery commences the date upon which the State will receive PFS's consequences reports (June 30) and the hearing will commence eleven weeks later. Compressed into those eleven weeks, the State must, at a minimum, do the following: (1) analyze PFS's consequences reports and determine the experts the State needs to challenge the reports; (2) determine whether to prepare a consequences report and potentially prepare one; (3) conduct written discovery, including finding out the number of PFS and Staff witnesses, the scope of their testimony, and their expertise; (4) analyze the Staff's evaluation of PFS's reports; (5) conduct depositions of an unknown number of PFS and Staff witnesses; (6) prepare written direct testimony for all direct case witnesses; (7) review other parties' direct testimony; (8) file motions in limine, if needed; and (9) prepare for trial. The State has adhered to other expedited schedules in this proceeding but this compressed schedule unfairly hampers the State's ability to adequately put on its case at trial.

Without waiving the foregoing objections and in response to the Board's instructions that it intends to make every attempt to meet the Commission's directive, the State has joined with PFS and the Staff to develop a tentative litigation schedule. The State's willingness to propose tentative litigation deadlines, however, depends on factors such as receiving from PFS with its consequences reports all documents and computer input files

relevant to those reports; immediately receiving requested documents from the Staff and the Commission; the availability and cooperation of witnesses for deposition and to testify at hearing;⁵ and treating the procedures relating to consequences as non-safeguards or non-classified. In regard to the latter matter, the State learned late in the day Tuesday (June 17) that, notwithstanding the fact that the Staff has yet to see PFS's consequences reports, it intends to initially pronounce the reports be treated as "safeguards." As a consequence, the earliest the State will receive a copy of the reports is Monday, June 30. However, counsel for the State responsible for this part of the PFS litigation (Mr. Soper) may not be able to view the reports. Also, any expert the State needs to review the reports may be denied access thereto.

The State is familiar with safeguards procedures and has experienced how much those procedures burden and retard the proceeding. The most cumbersome part of the safeguards procedure is that no safeguards information may be transmitted by e-mail or discussed on the telephone. This situation will stifle any meaningful communication between State lawyers and their experts, especially those who are not located in the Utah. Another burdensome procedure is that all written work must be done on a stand-alone computer (not one connected to a network). Presumably, PFS has had the opportunity to develop its reports and openly communicate with its technical contractors and not be constrained by burdensome safeguards procedures. Once PFS's reports are submitted to NRC, however, and the onus turns to the State to analyze those reports, very restrictive procedures are put in place.⁶

⁵ The State cannot identify its witnesses until PFS's reports are available. Therefore, at this time, the State cannot assure witness availability on the tentative deposition or hearing dates.

⁶ Under the procedure proposed by the Staff, PFS's technical contractors who developed the reports should now be banned from further access to the reports they produced until they are cleared to review safeguards material.

In order to have some semblance of fairness in this proceeding, the State requests the Board act under the Commission's delegation of authority, viz: "we specifically authorize the Board to use whatever procedural devices it deems necessary to reach a timely decision." CLI-03-05, slip op. at 7. Here, the Board should institute a procedure where the information in the PFS reports could be protected by a less onerous means than under the strictures of safeguard procedures. There is already an established system in place for keeping information confidential that could be used here. For example, any proprietary information the State receives from PFS, it only distributes to persons on a "need to know basis." Persons who receive proprietary information are instructed to prevent distribution or access to that information by unauthorized persons. Proprietary documents filed with the Board are distributed to a restricted service list. There is no prohibition to discussing the information on the telephone, transmitting documents by e-mail or using networked computers. If such a procedure were instituted for aircraft crash consequences, then a tentative litigation schedule could be attempted.

The Board, not the Staff, controls these adjudicative proceedings, and the Commission has been explicit that it expects the Board to use whatever procedures are necessary to expedite this matter. Here the Board could institute the procedures suggested by the State consistent with Commission directives and without impinging on the Staff's role. First, the Staff stated in the April 30, 2003 Second Joint Report on Consequences that PFS need not amend its license application until

such time as the Applicant revises its proposed licensing basis to include reliance on such analysis; 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-03-4 and PFS determines that it wishes to revise its licensing basis to include reliance on a consequence analysis.

Second Joint Report at 7. Second, the Commission has not dismissed the petitions for review of LBP-03-04 filed by the Staff and PFS but has held them in abeyance so the Staff's statement above is still operative. Third, PFS has not requested to include reliance on its consequence analysis as a change to the licensing basis. Fourth, in ruling on the State's terrorism contention, Utah RR, the Commission noted that the possibility of a terrorist attack on the PFS facility is speculative and that "terrorists seeking to cause havoc and destruction would find many targets far more inviting than the proposed PFS facility." CLI-02-25, slip op at 11, 14. Treating the PFS consequences reports as confidential would be within the Board's authority and consistent with the Commission's May 28, 2003 Order.

One significant inequity in the tentative schedule is that the Staff will have six weeks to review and take a position on PFS's reports; deposition of Staff witnesses will be conducted 5 days later. The State has only four weeks to produce an expert report (if any) and depositions of PFS and Utah witnesses will commence five weeks after receipt of PFS's reports. In addition, if the schedule has any chance of working, the discovery procedures applicable to PFS and the State should also apply to the Staff in lieu of 10 CFR §§ 2.740a(j) (depositions and written interrogatories) and 2.744 (document production).

In sum, there is the potential to meet the tentative proposed schedule but if, and only if, all of the following occur: non-safeguards procedures, timely access to and receipt of relevant documents from the Staff and PFS; co-operation and availability of witnesses for deposition and hearing; timing of the Staff's evaluation of PFS's reports; expeditious resolution of disputes; and the same discovery procedures applicable to the Staff as those applicable to the State and PFS. If the foregoing cannot be resolved through the unusual procedures the Commission expects the Board to employ, the State requests the Board to advise the Commission of the impossibility of meeting the Commission's desired December deadline for concluding these hearings.

PFS and the Staff propose that the Board institute the protective order procedures that were in place when the State litigated PFS's safeguards plan. Those proceedings involved one State expert witness (William Sinclair). PFS initially objected to the grant of a protective order to Mr. Sinclair arguing that the order only applies to a "qualified witness" and the State had not made that showing.⁷ Until the State has access to the PFS reports, it will not know what witnesses it needs for hearing and, in any event, it should not be required to demonstrate witness qualifications in order to obtain access to documents relevant to litigation. PFS and the Staff refer in this report to "consultants" rather than "witnesses" who may, under a protective order, obtain initial access to PFS's reports. If, after the State reviews PFS's reports, it identifies consultants (who may not necessarily be testifying witnesses) who need access to the reports, those consultants should be afforded timely access under a protective order.

B. Proposed Schedule for the "Consequences" Litigation

In preparation of this Joint Report, counsel for PFS, the State and the Staff have engaged in extensive discussion concerning the schedule for the consequences litigation. Based on these discussions, the parties have agreed to the following proposed schedule for litigating consequences through to the end of the hearing.

Discovery ⁸	June 30 (Mon) to Aug. 8 (Fri), 2003 and Aug 14 (Thurs) to Aug. 21(Thurs)
Receipt of PFS's Expert Consequences Report(s) and related backup (reference documents, computer input files, etc).	June 30 (Mon), 2003
Identification of witnesses, including their credentials, and subject matter of their testimony.	July 21 (Mon), 2003

⁷ See Applicant's Response to State of Utah's Motion for a Protective Order to Review and File Contentions on the Applicant's Physical Security Plan (November 19, 1997) at 1-2.


⁸ The parties will work toward developing standard discovery requests and timing of responses applicable to all parties.

Receipt of Expert Consequences Report, if any, by the State and related backup (reference documents, computer input files, etc).	July 28 (Mon), 2003
Receipt of Staff Written Evaluation of PFS's Expert Consequences Reports	Aug. 15 (Fri), 2003
Expert Depositions Conducted as part of Discovery	Aug. 4 (Mon) to Aug. 8 (Fri), 2003, Salt Lake City Depositions and Aug. 14 (Thurs) to Aug. 21 (Thurs), East Coast Depositions, with August 20 and 21 tentatively set aside for depositions of the NRC Staff witnesses and any supplemental depositions relating solely to the Staff's Written Evaluation.
Filing of Pre-Filed Direct Testimony	Sept. 5 (Fri), 2003
Motions in Limine	Sept. 12 (Fri), 2003
Oral argument and ruling on Motions in Limine	Sept. 15 (Mon), 2003
Hearing	Sept. 15 (Mon) through Sept. 26 a.m. (Fri), 2003

While having agreed to the above schedule through hearing, the parties are proposing different dates for the filing of findings of fact and reply findings of fact. The parties' proposed dates for findings and decision by the Board are as follows:

	PFS Proposed Dates	State and Staff's Proposed Dates
Simultaneous Findings	Oct. 17 (Fri), 2003	Oct. 24 (Fri), 2003
Simultaneous Reply Findings	Oct. 31 (Fri), 2003	Nov. 14 (Fri), 2003
Licensing Board Decision	Dec. 31 (Wed) 2003	Dec. 31 (Wed) 2003

Respectfully submitted,



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June 19, 2003

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NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the Joint Report on Proposed Schedule For Litigation Of The "Consequences" Proceeding was served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage pre-paid, this 19th day of June, 2003.

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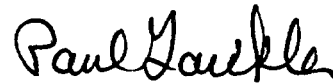
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