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NUCLEAR REGULATORY COMMISSION

Title: Private Fuel Storage

Docket Number: 72-22-ISFSI

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February 17, 2004 (9:01AM)

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

3 *****

4 ATOMIC SAFETY AND LICENSING BOARD PANEL

5 ORAL ARGUMENT

6

7 IN THE MATTER OF:

8 PRIVATE FUEL STORAGE, L.L.C

9 Docket No. 72-22-ISFSI

10 (Independent Spent Fuel
11 Storage Installation)

12

13
14 Thursday, February 12, 2004

15 Teleconference

16
17 The above entitled matter came on for
18 hearing, pursuant to notice, at 3:00 p.m.

19 BEFORE:

20 MICHAEL C. FARRAR Chairman

21 PETER S. LAM Administrative Judge

22 PAUL ABRAMSOM Administrative Judge

23
24
25

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1 APPEARANCES:

2 On Behalf of the Applicant:

3 SEAN BARNETT, ESQ

4 PAUL GAUKLER, ESQ

5 JAY SILBERG, ESQ

6 of: Shaw Pittman, LLP

7 2300 N Street, NW

8 Washington, DC 20037

9 202.663.8063

10 On Behalf of the Intervenor, the State of Utah:

11 DENISE CHANCELLOR, ESQ

12 CONNIE NAKAHARA, ESQ

13 JIM SOPER, ESQ

14 JEAN BRAXTON, ESQ

15 of: Utah Attorney General's Office

16 160 East 300 South 5th Floor

17 PO Box 149873

18 Salt Lake City, UT 84114

19

20

21

22

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On Behalf of the Nuclear Regulatory

Commission:

SHERWIN TURK, ESQ

LAURA ZACCARI, ESQ

MARK DELIGATTI, ESQ

BERNARD STAPLETON, ESQ

of: Office of the General Counsel
U.S. Nuclear Regulatory Committee
Washington, DC 20555-0001

1 P-R-O-C-E-E-D-I-N-G-S

2 3:20 p.m.

3 CHAIRMAN FARRAR: We'll go on the record
4 now. It's 3:20.

5 This is Michael Farrar, I'm the Chairman
6 of the PFS Board. We have actually been in session
7 for 15 minutes on this PFS prehearing conference
8 call, but we had a problem with the recording, so
9 we're going to quickly repeat the items that we had
10 dealt with.

11 I have here with me Judge Peter Lam,
12 whom you know and Judge Paul Abramson who has
13 recently been assigned to the case in place of Judge
14 Kline. And I'll speak to that in a minute.

15 I also have Jack Whetstine, top
16 administration person, Susan Lynn our law clerk and
17 Sue Gagner from our Office of Public Affairs; not
18 that anything's going to be published about this,
19 but she wants to keep up on what's happening.

20 Who do we have for the state?

21 MS. CHANCELLOR: Denise Chancellor,
22 Connie Nakahara, Jim Soper and Jean Braxton.

23 CHAIRMAN FARRAR: Thank you, Ms.
24 Chancellor.

25 For the company?

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1 MR. GAUKLER: This is Paul Gaukler. I
2 have with me Jay Silberg and Sean Barnett.

3 CHAIRMAN FARRAR: Thank you, Mr.
4 Gaukler.

5 From the staff?

6 MR. TURK: This is Sherwin Turk. With
7 me are Mark Delligatti, Laura Zaccari and Bern
8 Stapleton.

9 CHAIRMAN FARRAR: All of them have been
10 in front of us before, except Ms. Zaccari. And we
11 welcome you to the proceeding.

12 Let me say a quick word about Judge
13 Abramson and Judge Kline. Judge Abramson's bio will
14 soon be up on the website, but for present purposes
15 you need to know that he is both legally and
16 technically qualified. Had started up in life with
17 a Ph.D in physics. Worked at Argonne for some time
18 and was a professor of physics. He then got his JD
19 and practiced law for a number of years, was the
20 partner in two law firms dealing with international
21 project finance. So we're delighted to have him
22 here.

23 We're equally sorry to have seen Judge
24 Kline move on. He had retired once and come back.
25 Speaking personally, he had provided extraordinary

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1 service. When I had retired with the agency and was
2 assigned this case, he not only was very technically
3 expert and astute, but he was astute in all the
4 other aspects of managing cases and dealing with
5 people, and was as I said, not only a technical help
6 to me but help in any number of other respects.

7 So we're sorry that he's leaving, but
8 again we understand his interest in spending his
9 retirement years with people other than ourselves.
10 So we wish him well and appreciate his service.

11 There four items I want to take up
12 today: The matter of how we deal with safeguards
13 information as we get to the point where we can no
14 longer talk around it but have to talk about it;
15 talk about thoughts of oral argument on the state's
16 recently filed contention; begin to talk about
17 getting back on our schedule, which we got off of
18 four months ago. And then find out from you all
19 which contentions, we have a list of two or three,
20 that have been taken out of the case over the past
21 couple of years but perhaps a final order to that
22 effect was not entered.

23 In terms of while we were on the
24 unrecorded portion earlier, we did talk about secure
25 telephones and the possibility of the state being

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1 able to use one in the Governor's office or Hill Air
2 Force Base. We gave the state people the names of
3 the contacts to deal with here, one being a coworker
4 of Mr. Stapleton's, one being Jack Whetstine from
5 our office and the State will work with them. Mr.
6 Stapleton's coworker is Nancy Fontaine. State will
7 work with them to see that we get a secure phone
8 line so that when we have future short proceedings,
9 we can do them by phone rather than asking people to
10 fly around the country.

11 Let me go off the record for a minute
12 here.

13 (Whereupon, off the record.)

14 CHAIRMAN FARRAR: Back on the record.

15 We were going to talk, we all want to be
16 sure and know what the principles being applied are
17 so that we can observe those principles.

18 We have previously said that the Board
19 does not pretend to be expert on safeguards matters,
20 that we defer to people who have expertise and
21 responsibility. But we do need to know what the
22 principles are.

23 Mr. Turk, you have in front of you the
24 state's suspension TT?

25 MR. TURK: Yes, I do.

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1 CHAIRMAN FARRAR: Okay. On the first
2 page, Mr. Stapleton you had, is that sentence that
3 begins with the words "The purpose"?

4 MR. TURK: Yes, Your Honor. This is
5 Sherwin Turk.

6 CHAIRMAN FARRAR: Okay. Now that then
7 is a statement as your concerned the first half of
8 the sentence which talks about the purpose or the
9 second half that talks about dimensions or both?

10 MR. TURK: May I respond, Your Honor?

11 CHAIRMAN FARRAR: Yes.

12 MR. TURK: Let me say first of all that
13 I developed my letter of January 29th indicating
14 which portions the staff believed to definitely set
15 forth safeguards information. I developed that in
16 conjunction with Mr. Stapleton.

17 We identified three sentences, an
18 attachment and an exhibit in that light. Our
19 activity there was heightened by the fact that the
20 materials expressly mentioned or was linked to
21 vulnerabilities or consequences. And you'll see
22 that first sentence has that sort of a flavor to it
23 on page 1, paragraph 1 .

24 CHAIRMAN FARRAR: All right. Let me
25 interject there, Mr. Turk. As I understood before

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1 we got your letter, that we were all clearly that
2 safeguards category would cover angles and speeds of
3 planes that might cause damage, but we didn't
4 anticipate that descriptions of the cask dimensions,
5 which we had covered in some detail for example on
6 the seismic issues, would be safeguards. So can one
7 of you speak to why? Is this a change or are we
8 being either inconsistency here or just elaborate
9 for the record?

10 MR. TURK: As I think before the court
11 reporter began recording our conversation, in my
12 letter of January 29th I identified certain
13 sentences or attachments that the staff considered
14 to be especially needful of treatment as SGI. But
15 we didn't rule out that other portions of the
16 contention should also be treated that way.

17 The staff's view with respect to
18 treating this material as safeguards information I
19 believe can be summarized as follows: Normally, we
20 would not designate information about the cask or
21 cask components as safeguards information. And for
22 that reason the discussions that we've had in the
23 seismic hearings and other portions of the
24 evidentiary hearing about the cask or its components
25 were never deemed to be necessary to be treated as

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1 safeguards information.

2 Once we enter the arena of aircraft cash
3 consequences, the discussion becomes more sensitive.
4 And if we start talking about any changes to the
5 cask in the context of the aircraft crash
6 consequence proceeding, then our sensitivities are
7 heightened and we believe that it would be
8 impossible to talk about proposed changes in the
9 cask in this context without treating that matter as
10 safeguards information.

11 So we're being a little bit more
12 protective against disclosure in light of the events
13 of September 11th.

14 CHAIRMAN FARRAR: That's because, in
15 other words, if you change this cask and the world
16 knows how you changed it, then they also know that
17 there are casks elsewhere in the country that have
18 not been changed.

19 MR. TURK: Someone could possibly make
20 that speculation.

21 ADMIN. JUDGE ABRAMSON: This is Judge
22 Abramson, Mr. Turk.

23 With this change that is being proposed
24 to be implemented, you will -- is it your view or
25 the staff's view that this would require further

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1 analysis of other aspects which have already been
2 ruled on? I mean, we're talking about a change
3 that if implemented would be in the cask generally
4 and would this safeguards classification then
5 permeate everything we do because it's being
6 implemented in this context?

7 MR. TURK: My first impression in
8 response to that, Your Honor, would be no. But
9 there may be situations in which it would have that
10 effect. It depends how the discussion comes up and
11 how it's handled.

12 If PFS, for instance, was simply to make
13 a design change without linking it to any particular
14 reason or any particular portion of this proceeding,
15 it was just a design change of the cask, I wouldn't
16 have any reason to treat it as safeguards
17 information.

18 CHAIRMAN FARRAR: Mr. Gaukler, does your
19 client have any position on this or do you defer to
20 the staff?

21 MR. GAUKLER: I guess we don't
22 necessarily have a position on this. I had already
23 saw, like you Your Honor, that dimensions such as
24 the dimensions of the component we're talking about
25 here, would not be safeguards. It was just a

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1 thought that I had and that's the way we had
2 conducted our factions.

3 So I took from what the staff did with
4 respect to Mr. Turk's letter that we have tied the
5 component to the purpose for which it was put in,
6 talking about the purpose was the safeguards. And
7 now I gather that we may be going beyond that just
8 talking about maybe just pure dimensions by
9 themselves might be safeguards. And that's unclear
10 to me right now.

11 But I had never considered just the
12 dimensions itself totally apart from any purpose for
13 which the component would be used to be safeguards.

14 CHAIRMAN FARRAR: All right. Thank you,
15 Mr. Gaukler.

16 Ms. Chancellor, let me ask you to speak
17 to this. And I believe during the unrecorded earlier
18 discussion we had that you have an issue with the
19 staff in terms of your attempts to not so much
20 appeal some of these rulings, but reclarify some of
21 the rulings. So why don't you state that for the
22 record then?

23 MS. CHANCELLOR: Thank you, Your Honor.

24 With respect to the Utah expert reports
25 that were filed relating to aircraft crashes, the

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1 staff made a determination that four of the six
2 reports contained safeguards information. And we
3 didn't receive a portion marked "copy" of the
4 reports. All we received was for those safeguards
5 information without any rational whatsoever.

6 And it seems to me that especially where
7 you have an attorney on the other side making the
8 decisions as to what and what is not in the public
9 record, there's absolutely no transparency, there's
10 no way in which the state of any other party knows
11 why that information is considered safeguards.

12 The last time that Mr. Stapleton was on
13 the phone with us he said frequently a small portion
14 of a report could trigger a safeguards label. So the
15 state wrote to Mr. Turk in November, a couple of
16 days after he submitted his letter saying that the
17 four reports were safeguards.

18 I didn't hear back from Mr. Turk,
19 although informally he told me that Mr. Stapleton's
20 office, the Office of Nuclear Security and Incidence
21 Response were responsible for making the safeguards
22 determination. So on January 2 I wrote to Mr.
23 Zimmerman, the Director of that office requesting a
24 portion marked copy of the reports and also noting
25 that if NRC is going to make safeguards

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1 determination based on the quality or the likelihood
2 of success on the merits of the documents that are
3 before them, then there's going to be no objectivity
4 or any consistency.

5 And, for example, to get a contention
6 admitted into this proceeding you have to plead with
7 specificity and give details of what the concerns
8 are. Now with respect to Utah TT, as you can see
9 from the exhibits, most of the information is in a
10 public document in the Holtec final safety
11 evaluation report. And there it's a public record,
12 the dimensions of the cask, the thickness of the
13 walls; everything that we have in this contention
14 with respect to the cask dimension with the
15 exception of the -- can I say a word?

16 MR. TURK: Say the word "change."

17 CHAIRMAN FARRAR: The F word?

18 MS. CHANCELLOR: The F word.

19 MR. TURK: I think we all knew which
20 word you wanted to say. But if you just use the
21 word "change," I think that's --

22 MS. CHANCELLOR: The F word. No. So
23 it's really only with respect to that new design
24 feature that this contention deals with anything
25 that came out of a safeguards document. Everything

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1 else, everything else is open and available in the
2 public record.

3 And just to show you the extent with
4 which I think that the safeguards issue is not being
5 open -- well, open is the wrong word. Where there's
6 really no standards, the exhibit that the state
7 included with Dr. Tillex' résumé was not reviewed by
8 anyone, and it says that it's probably safeguards.
9 Well, this CD has been played on -- has been
10 broadcast in public forums and on national
11 television. So I think that just illustrates that
12 this just seems to be scandalous as to what is
13 safeguards and what isn't.

14 And the frustration is that it is so
15 onerous to deal with safeguards information in terms
16 of having to lock everything up in the safe and also
17 our ability or inability to communicate with our
18 experts.

19 I think I've said my piece. Thank you.

20 MR. TURK: Your Honor, when you're
21 ready, I'd like to respond briefly.

22 CHAIRMAN FARRAR: Go ahead.

23 MR. TURK: Just a few points.

24 First, there is no attorney over on this
25 end making a determination as to what is safeguards

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1 or what is not. I personally am not designated to
2 make those determinations. It is the Office of
3 Nuclear Security and Incident Response that makes
4 that determination.

5 As I've said in the previous
6 conversations with the Board and the parties, NSIR
7 is a staff office that reports up to the Executive
8 Director of Operations and they work with OGC as
9 legal counsel. And we assist and participate in
10 discussions with them, and they are making their
11 determination. So it is NSIR, not OGC that makes
12 that determination.

13 Second, with respect to Utah's concern
14 that the public be able to view our proceedings with
15 transparency, that is normally the way we operate.
16 The Commission does have a great interest in public
17 confidence and we are aware that normally by making
18 things opening to the public we can instill greater
19 confidence so that the public can observe and
20 understand that we take various safety and
21 environmental concern seriously, and we give them
22 due consideration before we reach decisions. So we
23 share the state's view that there should be
24 transparency wherever possible.

25 Here we have a unique situation. We are

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1 required by the Atomic Energy Act not to disclose
2 safeguards information. All the parties and the
3 Licensing Board have that obligation. We are aware
4 of events of September 11th which make it important
5 for us to be protective of the public interest. And
6 one way that we can protect the public health and
7 safety is not to disclose information which could be
8 useful to an adversary seeking to harm Americans
9 here in America. And it is for that reason that we
10 have determined that some information must be
11 treated as safeguards information and withheld from
12 public disclosure.

13 What we come down to then is simply
14 perhaps a minor disagreement about what matters
15 should or should not be treated as safeguards
16 information.

17 CHAIRMAN FARRAR: Let me interrupt here
18 a second. Everybody at all four locations on this
19 phone call absolutely shares the view that you just
20 stated. I think our concern is that some of us are
21 having trouble understanding how this fits in with
22 that.

23 Someone just joined the call?

24 COURT REPORTER: No.

25 CHAIRMAN FARRAR: Okay.

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1 ADMIN. JUDGE LAM: Also let me add my
2 comments to this discussion here.

3 I would like to put on the record my
4 earlier questions to the staff, not that I'm doing
5 any bidding for the state inasmuch deference as I
6 had with the staff determination.

7 How come the staff feels classified the
8 state's expert report as safeguards information
9 while the state's expert has maintained they have
10 not relied on any safeguards information. I'd like
11 to hear the staff respond on record.

12 MR. TURK: Your Honor, that's a good
13 question and it's thought provoking, but I'd like to
14 respond.

15 In the normal course of events any
16 academic or private person could reach whatever
17 judgments they want with respect to whether
18 something does or does not create a threat to a
19 nuclear facility. They could publish their views.
20 They could publish academic papers. There would be
21 no interference or involvement of the U.S.
22 Government, and certainly not by the Nuclear
23 Regulatory Commission in trying to limit that
24 person's ability to freely express his views.

25 Here, however, the state has entered

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1 into a legal proceeding within the Nuclear
2 Regulatory Commission. It is advancing certain
3 reports which it wishes the Licensing Board and the
4 Commission to consider and then to have the
5 Commission reach a decision on whether that
6 information indeed shows vulnerabilities or problems
7 with a nuclear facility design or the licensing of a
8 nuclear facility.

9 By invoking the Commission's legal
10 authority they put themselves and the information
11 that they present to you into an arena where it
12 needs to be treated with the same precautions as any
13 other information the Commission considers in
14 reaching its decisions. And for that reason, we've
15 decided that the state's analyses and reports must
16 be treated the same way we would treat the
17 applicant's or the staff's reports; with caution.
18 Because ultimately the Commission may decide in the
19 state's favor and find that those same reports that
20 the state has said are not safeguards information
21 are the basis for some decision which does touch
22 upon safeguards by the Commission.

23 ADMIN. JUDGE ABRAMSON: Mr. Turk, rather
24 than belaboring this issue, I think at least those
25 of us in this room understand the caution that the

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1 staff is urging in this matter. Given that, do you
2 foresee that we can have any kind of oral arguments
3 without using secure lines?

4 MR. TURK: We believe that if we're
5 going to start talking about particular design
6 features that are discussed in connection Utah TT,
7 we will need to use a secure line.

8 CHAIRMAN FARRAR: Mr. Stapleton, first
9 let's make sure the state gets an answer to their
10 letter.

11 Second, have you checked the validity of
12 your ideas with your superiors? Because if we're
13 going to proceed along the lines Judge Abramson just
14 said, I want to make sure that we --

15 ADMIN. JUDGE ABRAMSON: That we can in
16 fact do it.

17 CHAIRMAN FARRAR: No, that we can do.
18 We can do anything on a secure line that we want to
19 do. But I want to know, Mr. Stapleton, to make sure
20 you're not being over protective. Can you in the
21 next few days explain this to your superiors and
22 make sure that the approach you're taking is not
23 overly cautious? And the only reason I ask that is
24 these procedures are burdensome. The state said a
25 long time ago they're burdensome. We find them

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1 burdensome. And we're probably best as well
2 positioned as anybody to deal with it. But there's
3 no sense putting burden on everybody if we don't
4 need to.

5 So, Mr. Stapleton, can you just check
6 the validity of your ideas?

7 MR. STAPLETON: Yes, sir. Let me
8 address Ms. Chancellor's January 2nd letter to Roy
9 Zimmerman, the office Director for which I work.

10 I have had discussions with my senior
11 management this week, which we believe we'll be able
12 to address Ms. Chancellor's concerns. I don't want
13 to comment as to the direction we're going in until
14 my office Director actually signs the letter out.
15 But I do believe that we can shortly respond to her
16 January 2nd letter.

17 As far as the determinations that have
18 been made thus far regarding what is to be
19 considered safeguards information, I have had higher
20 level discussions with my management up to the
21 Deputy Office Director. And I can say that there is
22 general agreement with the process that we've been
23 using thus far.

24 CHAIRMAN FARRAR: Hello?

25 MR. STAPLETON: Yes, sir. Can you all

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1 hear?

2 CHAIRMAN FARRAR: Yes. It just sounded
3 like there was click on the line.

4 MR. STAPLETON: We're still here, Your
5 Honor.

6 CHAIRMAN FARRAR: All right. Go ahead.

7 MR. STAPLETON: So, Your Honor,
8 continuing there is a general agreement that senior
9 managers of the Office of Nuclear Security and
10 Instant Response with the concept that we've been
11 using thus far, we have not addressed all of the
12 specific issues to obtain their approval. But, as I
13 said, there is general agreement with the process
14 we're following.

15 CHAIRMAN FARRAR: All right. Thank you,
16 Mr. Stapleton. I think then we'll proceed along the
17 lines Judge Abramson suggested, which is don't
18 attempt anymore to have insecure phone calls because
19 the things we want to talk about get too close to
20 the line.

21 Let's move on then. We all reviewed all
22 the materials with the state's contention TT. Not
23 only the state's filings, but the applicant's and
24 the staff's. And we had planned today to tell you
25 some of the things we were thinking about that we

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1 would like you to address in an upcoming oral
2 argument. And let's see if we can do that being
3 conscious of what was just said about safeguards.

4 Mr. Stapleton at any point that somebody
5 says something that rings a bell with you that we've
6 stepped over the line, I want you to speak up and
7 interrupt immediately. And we will ask this court
8 reporter not to transcribe whatever the offending
9 statement was. I recognize that's not a perfect
10 solution, but it's a 98 percent solution, so let's
11 proceed on that basis so that we can accomplish
12 something today and not lose a couple of weeks that
13 people could put to good use in moving this
14 proceeding along.

15 One issue that has come up in the
16 precedents that the company cited for why this
17 particular change is a matter not for litigation in
18 front of us, but is a matter for staff and staff
19 procedures and inspections. We had dealt with an
20 issue like that in our seismic decision. So you all
21 may want to go back and read that before the oral
22 argument. But I think we indicated in that decision
23 that at one point we had talked about a license
24 condition but had decided we didn't need to.

25 In that case, of course, the applicant

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1 had put on evidence in the hearing that showed that
2 it could put the soil cement together in a way that
3 would satisfy the criteria. And it was a matter for
4 the staff to inspect it. And a key point is whether
5 or not it was stated in that position, the applicant
6 failed to do that and the soil cement didn't work.
7 The risk was the applicant's that it would not be
8 able to go ahead with the project. There would be
9 no spent fuel on site at the time.

10 The concern that we have with the
11 current contention is that the state envisions a
12 scenario where spent fuel would be in the cask, some
13 sort of disruption smashing some -- something
14 untoward would occur and you could not get the lid
15 off and remove the spent fuel. And that that
16 becomes a different problem than you usually have
17 like with something like the soil comment.

18 The precedents the applicant cited refer
19 to dry runs, and we want you all to think --

20 ADMIN. JUDGE ABRAMSON: Sorry, Judge
21 Farrar for interrupting. But let me just address
22 this for a minute.

23 (Whereupon, telephone line
24 disconnected.)

25 ADMIN. JUDGE ABRAMSON: All right. Let

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1 me start this again.

2 At the risk of repetitive, as I said,
3 I've spent a far amount of time reading the
4 pleadings in this case. And I would like to ask the
5 parties to address the issue that's raised by the
6 applicant's response to the state's contention TT in
7 the following aspects.

8 It seems to me that both of the
9 submission rulings which are cited by the applicant
10 as support for the proposition that the change
11 that's being addressed should be dealt with as a
12 procedural and a operating matter rather than as a
13 licensing matter, both of those rulings rely upon
14 the fact that there was extensive data supporting
15 the procedure that was at question or rely upon the
16 fact that the staff will require pre-operational
17 testing including dry runs to verify that the
18 procedure is appropriate.

19 And I'd like to have the parties address
20 that matter because it may lead to a more rapid
21 resolution of this issue.

22 Did I miss anything I said before?

23 CHAIRMAN FARRAR: No.

24 ADMIN. JUDGE LAM: Let's make sure we
25 call before we had everything down.

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1 I have three other areas of concern I
2 would like to add all the parties need to address in
3 the oral argument. And then I'll turn the floor back
4 to Judge Farrar.

5 Number one: The earlier litigation on
6 all the financial matters implicit and explicit in
7 our decisions was that ultimately the spent fuel
8 canisters would be removed from the cask.

9 Question number one: With this latest
10 change the focus on in the latest contention TT have
11 any impact on our earlier rulings on financial
12 qualification?

13 Question number two: In our decision
14 there was issue we had not heard any evidence based
15 on this latest change mentioned in the contention TT
16 in either the task scientific analyses or in the
17 thermal analyses. Therefore, I'd like to hear
18 answers to the question with this latest change in
19 contention TT impacts on any seismic qualification
20 of the cask itself or had any impact on the thermal
21 performance of the cask.

22 Question number three: Are we dealing
23 with any sua sponte issue here? If so, then
24 Commission guidance perhaps is necessary for us to
25 proceed.

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1 CHAIRMAN FARRAR: Let me say the same
2 thing Judge Abramson said perhaps in a different
3 fashion. The way I look at this is -- maybe I said
4 this before --

5 ADMIN. JUDGE ABRAMSON: And maybe the
6 court reporter heard it or not.

7 CHAIRMAN FARRAR: On the soil cement,
8 the company proved in the hearing it could do
9 something, it was just a matter of checking later to
10 see whether it did that and no spent fuel was on
11 site.

12 As I read the state's contention here,
13 they're saying they'd like a chance to prove or they
14 think they have presented a basis that indicates
15 maybe the company can't do what it says. And
16 they're concerned that if the company tries and
17 fails with spent fuel in place, then we have a
18 problem. So I think the three of us, those are
19 three different ways of looking at this. But when
20 we come to oral argument, we wanted all of you,
21 again, not to address them today but to be prepared
22 to be thinking about this so that we could go at it.

23 But do all parties understand what we
24 just said? Mr. Gaukler?

25 MR. GAUKLER: I believe we do. Yes,

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1 Your Honor.

2 CHAIRMAN FARRAR: Ms. Chancellor?

3 MS. CHANCELLOR: I believe so, Your
4 Honor. And we'll check the transcript.

5 CHAIRMAN FARRAR: And Mr. Turk?

6 MR. TURK: Yes, Your Honor. But I have
7 one question about Judge Lam's third question.

8 CHAIRMAN FARRAR: Yes.

9 MR. TURK: When he asked is there a sua
10 sponte issue here, I assume he's talking about the
11 previous two issues that he raised.

12 ADMIN. JUDGE LAM: That's exactly right.

13 MR. TURK: Okay.

14 CHAIRMAN FARRAR: Right. In other words
15 and we know that unlike the old days we have no
16 right to do a sua sponte review. So we're clear that
17 if we discovered some brand new issue, you know, it
18 doesn't come in the case.

19 Judge Lam's point is here are two issues
20 that two different boards that he was on spent an
21 awful lot of time on, wrote some lengthy decisions.
22 Those issues were resolved. And there's a concern
23 that raising this could be viewed as sua sponte, but
24 by the same token there may be those in this room
25 who believe that when you send the Commission long

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1 decisions on particular issues and then new facts
2 come into the case, that somehow if we don't deal
3 with them, the Commission needs to be informed that
4 those issues are lurking out there. So that's what
5 we'd like you all to be ready to talk about.

6 Of course, those were not all the
7 questions we would ask on oral argument, but we
8 wanted to make sure that you had the benefit of our
9 advance thinking there so we could have a more
10 informed better structured argument.

11 In terms of schedule --

12 MS. CHANCELLOR: Your Honor, before you
13 go on, if I may. Do you have any idea how long
14 we'll need for oral argument just in terms of us
15 trying to get access to a phone?

16 CHAIRMAN FARRAR: Well, argument could
17 be a couple of hours. But at the end of argument we
18 want to do a real -- we're going to talk about
19 scheduling principles today. But then we want to
20 use that same phone call to talk about scheduling.
21 So we may be talking about --

22 MS. CHANCELLOR: For as long as three
23 hours?

24 CHAIRMAN FARRAR: Yes, three hour sort
25 of thing.

1 MS. CHANCELLOR: Okay. Thank you.

2 CHAIRMAN FARRAR: All right. Mr.
3 Gaukler, Mr. Silberg, we are conscious if this
4 contention does come in, we're certainly conscious
5 of our request that it be folded into what schedule
6 is derived and not extend the proceeding. And we
7 certainly will do that.

8 One way we will do that is at either at
9 the end of oral argument we will take a short break
10 and come back with an oral decision, or we will get
11 you a written ruling. It would be short, you know,
12 outline bullet point decision on whether that
13 contention is in or out. And if it is out, then we
14 will move. That is, if it's in, we move full speed
15 ahead folding that into whatever schedule we derive.

16 MR. GAUKLER: We appreciate that very
17 much, Your Honor

18 CHAIRMAN FARRAR: And in that regard in
19 terms of argument, we want all sides to be thinking
20 about prejudging case. You know, license conditions
21 and what their role with respect to TT. I mean,
22 there's maybe three ways: I mean the contention
23 could be out; the contention could be in and fully
24 litigated, or; perhaps there's a condition that deal
25 with the merits of the state's appearance. We want

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1 the parties to be ready to address what those three
2 wisdom or lack thereof of all three of those
3 approaches to the problem.

4 In terms of scheduling, we've been off
5 the clock for the last -- before I get to
6 scheduling, the overall proceeding is everyone
7 available the afternoon of Tuesday, February 24th.
8 The two reasons we have to wait: One, we need to
9 make sure we have the phone lines, find out and that
10 gives you a week to do so. Judge Abramson will not
11 be here next week. There's some other board and
12 panel business that he's involved in. And we
13 definitely want him here for that. So what we'd
14 like to do is tentatively schedule subject to the
15 availability of a phone line an oral argument and a
16 scheduling conference on Tuesday, February 24th at
17 1:00 p.m.

18 Mr. Gaukler, can your people make that?

19 MR. GAUKLER: Yes, we can, Your Honor.

20 CHAIRMAN FARRAR: Ms. Chancellor?

21 MS. CHANCELLOR: If we can get a phone,
22 we'll be there, Your Honor.

23 CHAIRMAN FARRAR: All right. And if you
24 can't phone, Ms. Chancellor, you'll be here. No.
25 You have an incentive to do that. But get Jack

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1 Whetstine involved because if you have any trouble,
2 we want to help you do this because we don't want to
3 be dragging you back and forth here.

4 MS. CHANCELLOR: I'd just like to alert
5 you, Your Honor, to another deadline we have on the
6 26th. That's the date by which our brief is due to
7 the Commission on some residual issues, cost benefit
8 and the effects of on site storage, the
9 interlocutory appeals that are usually heard at the
10 end of the case. We have our brief due on the 26th
11 February. So it would be difficult for us to travel.

12 CHAIRMAN FARRAR: Well, it might also be
13 -- are the same people working on the oral argument
14 as would be working on that brief?

15 MS. CHANCELLOR: There's overlap, Your
16 Honor.

17 CHAIRMAN FARRAR: Well, I'll tell you
18 what, let's hold this question of when we will have
19 this oral argument.

20 MS. CHANCELLOR: If we don't have to
21 travel, I think we could -- well, the --

22 CHAIRMAN FARRAR: Well, let's hold it
23 until we get partly into the scheduling of the
24 overall proceeding.

25 MS. CHANCELLOR: Okay.

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1 CHAIRMAN FARRAR: Because that helps
2 tell us how fast we have to do this. And if I can
3 avoid doubly -- I know you've all been burdened. I
4 think the applicant had a motion a while back
5 because they had six different things they were
6 doing at once, and that was certainly well taken and
7 we don't want any of you to be overburdened.

8 Let's get right to the main scheduling
9 issue. The company filed its RAI responses December
10 what, Mr. Gaukler?

11 MR. GAUKLER: I went them on December
12 10, you have December 11th.

13 CHAIRMAN FARRAR: Right. And so the
14 staff has had them for that long, although the staff
15 asked that the applicant consolidate different
16 answers to make it more readily reviewable. The
17 applicant did that and filed those January 30th.
18 Given that the staff had those in some form for six
19 weeks before January 30th, how long does the staff
20 need to review the applicant's filings?

21 MR. TURK: Your Honor, we have a
22 tentative date for when we believe we can be ready
23 with our review. And I'll be happy to give you my
24 projection as of this moment. I don't have my
25 technical reviewers in the room, so I can't get

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1 other information from them.

2 But let me point out we have not been
3 able to simply use PFS' RAI responses from December
4 without requiring them to give us more information
5 and to integrate all of the new information and
6 analyses that they gave us into a revised version of
7 their report.

8 And if you've had an opportunity to look
9 at the revised Holtec report for example, I believe
10 you'll see that it's substantially different from
11 the original Holtec report. And many analyses that
12 PFS had previously relied upon are no longer relied
13 upon at all. And that was not entirely clear until
14 we received the revised report.

15 So even though we had information and
16 we've been reviewing the previous information that
17 PFS had given us in December and earlier, PFS'
18 submission to us in the last ten days of January of
19 the revised analyses really provided a focused set
20 of documents for us to look at and be able to grasp
21 the basis for the PFS position that they don't have
22 a problem with their proposal.

23 I don't want to go into specifics, but
24 there was a lot of new information in the last ten
25 days of January that was not available to us

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1 previously. So it is not correct that we have had
2 the same information in our hands since December
3 11th.

4 The dates that we are projecting right
5 now for submitting our positions to the Board would
6 be sometime in April of this year. I can't give you
7 a specific date. I hope that next week after the
8 staff holds a telephone conference call with PFS, to
9 be able to get you a more specific date. But
10 roughly we're looking at somewhere in the month of
11 April giving you our final report.

12 Our reports will consist of two and
13 possibly three components. One will be our review of
14 what PFS has done. Two we will have our own
15 analyses performed by Sandia National Laboratories.
16 And three, we are doing an assessment of what the
17 state has given us in order to understand why does
18 the state believe that there is a great concern when
19 PFS says there is not.

20 So we will have a three part position to
21 present to you in April.

22 ADMIN. JUDGE ABRAMSON: Let me pick on
23 this for a moment. When did the staff turn Sandia
24 loose to start its analyses and when do you expect
25 Sandia themselves to have their results to you?

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1 MR. TURK: We began working with Sandia
2 when this issue first arose, approximately ten
3 months.

4 ADMIN. JUDGE ABRAMSON: No, that's not
5 my question. There were revised analyses submitted
6 by the applicant in early December. I've looked at
7 them. I didn't feel as a technical matter that I
8 needed to have somebody put those particular things
9 into the technical report for me to be able to
10 comprehend what the applicant was saying. And I'm
11 at a bit of a lose for why the staff feels they
12 needed to, but I will accept your judgment that the
13 staff needed to have somebody hand print them into
14 the overall report.

15 What I'd like to know is when did the
16 staff turn Sandia lose to look at the matters were
17 raised by the December 11th submittals from the
18 applicant?

19 MR. TURK: The December 11th submittal?

20 ADMIN. JUDGE ABRAMSON: Yes.

21 MR. TURK: Well, they've been looking at
22 it long before that, Your Honor.

23 ADMIN. JUDGE ABRAMSON: But the changes
24 that were introduced in the December -- I understand
25 they've been working on the balance of the analysis

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1 prior to then. I assumed that the staff had received
2 some input from Sandia prior to the new information
3 that came in in December. Was that inaccurate to
4 assume that?

5 MR. TURK: We have had a lot of
6 interaction with Sandia over the past eight months
7 or so in which they've been doing various runs for
8 us. And we've been discussing different aspect of
9 the PFS analyses with them, and they've been doing
10 assessments of those analyses.

11 I should give you a bit of history. Our
12 initial intentions in this proceeding to have Sandia
13 do a complete analysis of the PFS cask. The
14 Commission then directed that the proceeding be
15 expedited, and we believed that there was no way
16 that we could complete our own analyses in time to
17 go to hearing on the original schedule so we
18 interrupted Sandia's work. Roughly two or three
19 months later when it was apparent that we weren't
20 going to be moving forward on that originally
21 conceived of expedited schedule, we turned Sandia on
22 again. And they've been working on this project for
23 us for many months. Essentially since I would say
24 roughly this summer they've been busy with us. And
25 they have not been waiting for either the December

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1 submittal by PFS or the January submittal. They've
2 been working all along.

3 ADMIN. JUDGE ABRAMSON: So they're doing
4 confirmatory analyses. Their work was turned off
5 and recommenced, and they've been going full steam
6 ahead since mid-summer. Did I hear that correctly?

7 MR. TURK: That's my understanding. I
8 might be overstating the case, because I'm sure they
9 have other work that they've been involved in at the
10 same time they're doing this work for us. But --

11 ADMIN. JUDGE ABRAMSON: Is someone in
12 the staff working closely with Sandia so that Sandia
13 got the updated information that was presented in
14 the December 11th submittals or were you waiting
15 until the integrated documents to get Sandia the new
16 information?

17 MR. TURK: They received the information
18 soon after we received it back in December.

19 ADMIN. JUDGE ABRAMSON: Do you know
20 whether the staff had directed Sandia to start
21 implementing the requested changes into their
22 analysis and if so, when?

23 MR. TURK: I don't have my technical
24 reviewers with me, but it's my understanding that
25 they are looking the new information and we're

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1 expecting to -- well, I really need them here before
2 I give you information. Especially since we're on
3 the record, I want to make sure that I state it
4 correctly and it's understood correctly. But I can
5 assure you that the staff and Sandia are both
6 working with full attention on this project.

7 ADMIN. JUDGE ABRAMSON: Well, perhaps
8 when we have our next conference call, we can hear a
9 better update from you and your staff about the
10 progress of this report. I'm kind of surprised that
11 this is going to take until April to get to us, but
12 we'll respect the judgment of the staff. I'd just
13 like to hear a little more about that process.

14 CHAIRMAN FARRAR: Mr. Turk, it's Judge
15 Farrar. Let me up Judge Abramson's suggestion. Why
16 don't you have one of your people see if they can
17 get your technical reviewers in the room before this
18 call ends because we want to set some parameters or
19 principles today that will let us arrive at a final
20 schedule in the next phone call.

21 MR. TURK: We're trying to reach one of
22 them right now.

23 (Whereupon, at 4:19 p.m. off the record
24 until 4:21 p.m.)

25 CHAIRMAN FARRAR: Mr. Reporter, you

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1 still there?

2 COURT REPORTER: Yes, I just got back.
3 Did someone just pop on the line?

4 CHAIRMAN FARRAR: Have you missed
5 anything or have you been on continuously.

6 COURT REPORTER: It sounded like someone
7 just came on the line and I was disconnected at that
8 point.

9 CHAIRMAN FARRAR: When? What was the
10 last word you heard?

11 COURT REPORTER: There was Mr. Turk,
12 this is Judge Farrar, let me up the suggestion.

13 CHAIRMAN FARRAR: All right. And you
14 lost it from there?

15 COURT REPORTER: And I lost it. So did
16 someone else interrupt from there?

17 CHAIRMAN FARRAR: No. But you do not
18 have broad comment?

19 COURT REPORTER: No.

20 CHAIRMAN FARRAR: Off the record.

21 (Whereupon, off the record.)

22 CHAIRMAN FARRAR: Back on the record.

23 What I was saying when the beep
24 interrupt me, that I was going to up Judge
25 Abramson's suggestion and ask Mr. Turk to reach his

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1 reviewers and get them in the room so we could have
2 some broad parameters for you all to be thinking
3 about before this call was over, so we could think
4 about them on the next call.

5 My next point is, Mr. Turk, looking at
6 the milestone schedules we adopted last fall
7 sometime when we knew we were going to miss the
8 Commission's year end 2003 deadline but we were only
9 going to miss it by three months, we had PFS RAI
10 response coming in September 4th and the staff's
11 written evaluation coming in 26 days later. We now
12 are going from less than a one month process to
13 something that sounds like a two to three or four
14 month process depending on how you count. And the
15 only person possibly happy with that result is our
16 law clerk who thinks she may be beat it out of here
17 before this case comes to a conclusion. But to be
18 deadly serious about this, this is a very long time,
19 you know.

20 I know there's precedent or folklore
21 that says the Board doesn't tell the staff how to do
22 its business. But it seems like an extraordinarily
23 long time in a case in which the Commission has
24 hoped we would be done year end 2003. And the staff
25 doesn't work for us, but it works for the

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1 Commission. So is there some message we need to get
2 to the Commission that the staff needs more
3 resources or if they don't get more resources
4 there's no way for us -- in other words, we can't
5 tell the staff don't do your review. I mean we've
6 written opinion that say --

7 ADMIN. JUDGE ABRAMSON: We want their
8 review.

9 CHAIRMAN FARRAR: -- how important that
10 staff review is. Whether or not we ultimately
11 accept it, that the process depends on having the
12 staff review even though the ultimate decision we
13 make may or may not accept the staff review. And
14 really, our decision is on the merits of the
15 applicant's presentation, not the staff review. But
16 that the process calls for staff review.

17 Do we need to get to the Commission and
18 say the staff needs more resources or is this not a
19 resource driven exercise?

20 ADMIN. JUDGE LAM: Before you answer
21 that question, let me add my comments to Judge
22 Farrar's remarks.

23 The staff independent confirmative
24 analyses has been exceptionally useful in this long
25 proceeding. I, for one, am very appreciative of

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1 what the staff has done.

2 So Judge Farrar's question should be
3 framed in that context. You know, the resource
4 question here is not a criticism of what the staff
5 has been doing.

6 MR. TURK: I sense a number of fingers
7 pointing in my direction.

8 Your Honor, I appreciate everything that
9 Your Honors are saying. The staff is not looking to
10 protract this proceeding, but we believe it is
11 important for us to complete the work and to do it
12 well.

13 Sandia, as you may know, uses thousands
14 of multiple processors in parallel. The analogies
15 that they're doing are using finite and element
16 analyses. They're extremely complicated. They take
17 a lot of computer time.

18 We've had them do many different types
19 of analyses. We've asked PFS, as you may know from
20 looking at the staff's RAIs and looking at PFS'
21 responses, we've asked for a number of analyses to
22 be done by PFS which they initially did not do. And
23 considerably those analyses lead PFS to make certain
24 changes in their proposal as a result of the staff
25 inquiry.

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1 So we believe that the work that we're
2 doing is useful and we believe that it exceeds the
3 scope of the work as originally contemplated back
4 when the Board set its schedule.

5 Indeed, when you set up the original
6 conception of a staff response approximately one
7 month after we received the PFS report, it was based
8 on perhaps an incorrect or maybe inexperienced
9 understanding that we would need to do much more
10 than simply look at the PFS reports and agree that
11 they seemed reasonable or not.

12 In fact, the initial reports from PFS
13 raised so many concerns that PFS has required itself
14 to go back and spend several months developing
15 revised reports and to do many additional analyses
16 which they had not done originally.

17 So the original schedule never conceived
18 of the additional that PFS would have to do and it
19 did not contemplate the staff's review, which
20 therefore also takes more time.

21 At the same time, and this is not a
22 defense of the staff or of Sandia, but I would point
23 out that while the staff and Sandia are
24 simultaneously engaged in looking at the PFS
25 proposal, they both also involved in fulfilling

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1 Commission requirements looking at terrorist threats
2 outside of the context of the PFS. In fact, that's
3 not the PFS context at all. But terrorist threats
4 in general. And they're also working on responding
5 to a congressional directive that they study a
6 National Academy of Science effort that's going on
7 in this area. So the staff certainly has a lot of
8 work underway.

9 At the same time, I know from my own
10 weekly meetings with the staff that they are very
11 busily engaged, and that Sandia is very busily
12 engaged in working on the PFS project.

13 So all I can tell you, Your Honor, is
14 that we're aware of the need to expedite our review,
15 but we're also aware that the original schedule did
16 not contemplate the amount of work and the many new
17 issues that have arisen as the work progressed.

18 CHAIRMAN FARRAR: All right, Mr. Turk.
19 Thank you for that explanation.

20 Mr. Gaukler, let me ask you to speak on
21 behalf of your client in this regard. But before you
22 speak, one thing that comes to my mind and perhaps
23 to Judge Lam's, is that back on the seismic issue it
24 turned out to be fairly important that not only did
25 the applicant have an analysis which the state had

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1 tried to defeat, but that the staff had a separate
2 analysis when reached the same conclusion which I
3 think if you read our opinion, that staff analysis
4 played an important role in the decision in favor of
5 the company on the seismic issue.

6 So again, with that background, do you
7 want to speak to what we've been talking about here
8 with the length of time for the staff review?

9 MR. GAUKLER: Not much, Your Honor. I
10 think what I would like to say is that, you know, we
11 tried to make clear in our RAI response that the
12 information was basically there. And we tried to
13 make clear what we were changing, what we were not
14 changing in our mid-December responses. And that we
15 certainly know the staff's been working hard and we
16 would like to have them get done as soon as we
17 could.

18 We would like to be able to be in a
19 position where we could get the hearing by 4th of
20 July, at least, if at all possible. In that
21 respect, I would just say that to do that we'd have
22 to have some type of staff review early in April,
23 end of March.

24 CHAIRMAN FARRAR: Do you think we have
25 any authority to direct the staff to do its review

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1 faster than they say they can do?

2 MR. GAUKLER: Under the authority as I
3 understand it, the answer to that question is not.
4 You do not have authority to do so.

5 CHAIRMAN FARRAR: All right.

6 ADMIN. JUDGE ABRAMSON: Let me just make
7 one request, Mr. Turk, that in your discussions with
8 the staff, it sounds to me from what you said that
9 as if you run out a Sandia report quite a bit sooner
10 than April, and that the balance of that is the
11 staff's determination of how to integrate the Sandia
12 information with their own internally generated
13 information and production of their final report.
14 Perhaps you and the staff can find a way to compress
15 that part of the schedule?

16 MR. TURK: To compress which part of the
17 schedule?

18 ADMIN. JUDGE ABRAMSON: From the date
19 you received Sandia's final report to the date you
20 deliver something to us?

21 MR. TURK: I'll talk to the staff about
22 how can we compress any portion of the schedule.
23 And I'll be speaking with them in the next few days,
24 and hopefully I'll be able to get back to you by the
25 time of our next conference call with some

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1 indication of where we're able to squeeze the
2 schedule a little bit more, if we can.

3 CHAIRMAN FARRAR: Looking back at the
4 schedule we had adopted last fall, we had something
5 less than a month set aside for depositions. I
6 guess I have two questions now.

7 You once all had given us estimates of
8 how many witnesses you would each have. I ask you
9 either now or on our next call to come up to have a
10 new estimate of that. And second, is there any
11 discovery we can do among the state and the
12 applicant to get some of it out of the way in
13 advance?

14 Now, I say that to the extent you do
15 discovery in advance before you have the staff
16 report, you may get a little duplication that you
17 have to go back and re-depose those witnesses. But
18 if you have 80 percent of it done, the fact that you
19 might have to do 30 percent more, in effect you've
20 had an inefficiency of 10 percent but at the end
21 you're only doing 30 percent, not a 100 percent.
22 And you could save some time.

23 Is there anything that the state and the
24 applicant could do before we have the staff report
25 in? Mr. Gaukler?

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1 MR. GAUKLER: I think there is some
2 stuff we could do before the staff had its report
3 in. In terms of one, we can first of all see if we
4 can stipulate some of these witnesses away. I don't
5 know where the state stands, I have not talked to
6 them. That's one thing we should do, talk among
7 ourselves.

8 Second, I think on some of the issues we
9 could have discovery beforehand. And also there's a
10 possibility that I have suggested before, we could
11 have I think the staff's section maybe on the
12 aircraft crash reports, the British reports, those
13 two reports and the state's equivalent of them.
14 They might have their report and evaluation done on
15 that earlier such that everybody would be done on
16 that earlier and we could have depositions and
17 everything done on that by the time the staff got
18 its technical part of its report out.

19 CHAIRMAN FARRAR: Ms. Chancellor, what
20 do you think of Mr. Gaukler's idea?

21 MS. CHANCELLOR: Well, we're always
22 willing to work with the applicant, Your Honor. But
23 I question the question the 80 percent efficiency of
24 having depositions before all the information is
25 out. But we'd be happy to work with Mr. Gaukler.

1 Part of the difficulty with the
2 depositions is getting everybody's schedule in line.
3 It's going to be hard enough to do that for one
4 deposition, let alone to go back for a second
5 deposition.

6 Then we've got the safeguards problem.
7 Often we're followed with phone depositions and some
8 of the more minor witnesses. But here we can't even
9 do phone depos.

10 So we're willing to work with Gaukler,
11 but I don't think you should write down right now
12 that we can actually have depositions prior to the
13 staff's position.

14 ADMIN. JUDGE ABRAMSON: Perhaps between
15 now and our conference calls in ten days, or
16 whatever we pick, you can all be thinking about what
17 depositions you might be able to start on at the
18 earliest date so that we can keep this moving along.
19 And if there are none, there are none. But there
20 seem to me there may be some you can get going.

21 CHAIRMAN FARRAR: Mr. Turk, if we had
22 the state and the applicant starting that process,
23 you would want to be at those depositions. And you
24 usually bring a technical person with you?

25 MEMBER RANSOM: Yes.

1 CHAIRMAN FARRAR: Would that be taking
2 that person away from doing the other tasks that
3 we've talked about?

4 MR. TURK: There may be a way for us to
5 schedule it so we don't have too much interruption.
6 I'd be very willing to talk to the state and PFS
7 about setting up a deposition schedule that allows
8 us to do that.

9 And one thing that comes to mind is if
10 possible we can start the aircraft. But I need to
11 talk to my staff to see if we can get out the
12 aircraft portion of our work before the rest of it.
13 I think we probably can do that.

14 CHAIRMAN FARRAR: That would be helpful.

15 MR. TURK: And then it might make sense
16 just to go forward with that portion of the
17 deposition to get that out of the way before we get
18 the staff's work out on consequences.

19 CHAIRMAN FARRAR: Let me ask does anyone
20 -- give me a off-the-top of the head answer that I
21 will not hold you to how many witnesses, Mr. Gaukler
22 do you foresee now? And I will not hold you to
23 this?

24 MR. GAUKLER: I don't see any more
25 witnesses than what we talked about before. And if

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1 there's some issues that we feel that we resolve
2 with the state that they're really not going to
3 pursue, we might have less.

4 CHAIRMAN FARRAR: All right.

5 Ms. Chancellor?

6 MS. CHANCELLOR: We envision the same
7 witnesses, but that depends on what the staff
8 position ends up being. But at the moment, I think
9 we had like four panels of witnesses.

10 CHAIRMAN FARRAR: Do you remember how
11 many you had, Mr. Gaukler?

12 MR. GAUKLER: Unfortunately, I can't
13 remember off the top of my head, Your Honor.

14 CHAIRMAN FARRAR: That's all right.

15 Mr. Turk?

16 MR. TURK: I don't have a firm number,
17 but it might be ten to 12 people. Not individually,
18 but on different panels.

19 CHAIRMAN FARRAR: When you depose these
20 people, do you depose them as panels?

21 MR. GAUKLER: Your Honor, our experience
22 has been that we've done that in the past, I think
23 the state would agree with me, we found that to be
24 generally a good way to go about doing it.

25 MS. CHANCELLOR: Yes, Your Honor. I

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1 think I agree with Mr. Gaukler for the most part.

2 CHAIRMAN FARRAR: All right. Then it
3 seems to me that we would like you to be talking
4 about this early deposition process. Because given
5 the length of time the staff needs to do its work,
6 then we have to make every effort to use the
7 intervening time for some other purpose rather than
8 just sit and wait. So I'll ask you all to talk
9 about that.

10 Oh, one other thing, and I think we've
11 talked about this in an earlier prehearing
12 conference. We found very useful the last time, not
13 only your synopses of each witnesses' testimony, but
14 the key determinations piece. And I think we talked
15 about doing something more elaborate the next time.

16 I know some district courts in
17 complicated litigation insist on full blown proposed
18 findings of fact and conclusions of law before the
19 hearing starts so the judge has that in front of him
20 at the time. We don't want to ask you for that, but
21 we think we save a lot of time both in managing the
22 hearing and in writing our decision faster the more
23 that we have in advance. So we would like you all to
24 start thinking what sort of document can you prepare
25 given the other demands on you that would help us

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1 both in managing and directing the hearing
2 efficiently and getting a real jump start on the
3 writing of our opinion in an earlier stage than
4 we've been able to do before. So please think about
5 that either individually or in your conversations.
6 Because I think that is a key document in terms of
7 this decision is now on the critical path for the
8 timing of a final Commission decision and a decision
9 on the license. And we want to make sure that once
10 we have everything in front of us, we're in the best
11 possible position to move as quickly as possible.

12 MS. CHANCELLOR: Your Honor, are you
13 suggesting that the key determinations be prior to
14 the pre-court testimony and not in tandem with it?

15 CHAIRMAN FARRAR: I was thinking it
16 would be in tandem. But Judge Abramson has a
17 thought.

18 ADMIN. JUDGE ABRAMSON: Well, yes. Ms.
19 Chancellor, what would be very helpful to me, and to
20 the Board, is that at the time you fill your
21 pretrial testimony you present us with a very short
22 outline, a bullet sort of outline indicating what it
23 is that you're addressing, what the issue, what
24 supports your position, what facts support your
25 position and what conclusions you would draw from

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1 those facts. And if we have that from all parties
2 on every issues, it makes formulating the approach
3 to dealing with the issue quite a bit easier, I
4 think.

5 MS. CHANCELLOR: I believe that's what
6 we did in key determinations in seismic, but I'll go
7 back and review.

8 CHAIRMAN FARRAR: But I think as good as
9 those documents were, my thought is oh.

10 MR. GAUKLER: Last time we just
11 basically had the key determinations and maybe what
12 I understand Judge Abramson to say, maybe one layer
13 below that get some the key facts to support the key
14 determinations.

15 ADMIN. JUDGE ABRAMSON: Right. That's
16 good.

17 What I'm suggesting is that you tell us
18 what issue you're addressing and then what facts
19 bear on your feeling of that issue and how they lead
20 you to the conclusion that you would find; the
21 finding that you would like to see made. And I
22 would like to see that in very brief -- I can't say
23 brief loud enough -- form.

24 CHAIRMAN FARRAR: IT certainly would not
25 be in the detail of your proposed findings and

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1 conclusions. But when Judge Abramson says brief,
2 and listening to his description of it, it's not as
3 brief as the key determinations. He means brief in
4 terms of comparison to the proposed findings and
5 conclusions; very brief in comparison with those.
6 But he was not here when we did the key
7 determinations. And I think from what he's saying
8 it would be something more -- it would, as you said,
9 Mr. Gaukler, it would be a level beyond our key
10 determinations but still very brief.

11 ADMIN. JUDGE ABRAMSON: Yes. I'm
12 thinking this shouldn't be more than a page or two.
13 And Judge Farrar is shaking his head no.

14 CHAIRMAN FARRAR: Well, you all think
15 about this and we will talk about it here. We will
16 think about it. We want --

17 MR. GAUKLER: Your Honor?

18 CHAIRMAN FARRAR: Yes, sir.

19 MR. GAUKLER: Maybe it might be useful
20 before the next conference call if Judge Abramson
21 would look at the key determinations to see what he
22 thinks we should add. Because I'm questioning my
23 interpretation that he's asking for is another layer
24 just below that would be setting out some key facts.

25 CHAIRMAN FARRAR: Good suggestion,

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1 Mr.Gaukler. We will do that here so that, you know,
2 you all think about what is doable and useful for
3 you to do and we will think about it from this
4 point.

5 MS. CHANCELLOR: Your Honor, my concern
6 is that the more we put into the key determination
7 or whatever we call it, we need to be succinct, and
8 I understand that, but whatever we put into that is
9 going to take away from our ability to develop the
10 testimony. So, you know, you give one place and you
11 take from other. There is only so much that human
12 beings can do to get all of this filed. And pulling
13 the testimony together is a massive effort.

14 So even though the document is succinct,
15 it's supposed to be succinct, there's a lot of
16 effort that goes into it. And I think Travieso Diaz
17 will tell that you almost killed him trying to get
18 the key determinations on the seismic testimony.

19 And so all I'm saying is we have to also
20 look at what else needs to be done, too.

21 MR. GAUKLER: I'll chime in on that.

22 One suggestion that we might do, Your
23 Honor, is that when we just have the key
24 determinations due three or four days after the
25 testimony to give us a chance to finalize our

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1 testimony, then just put everything into the key
2 determination.

3 MS. CHANCELLOR: Great idea, Paul.

4 CHAIRMAN FARRAR: All right. And where
5 are we on that idea we had that to prevent the
6 tennis ball approach we had last time, that a
7 witness would take the stand, adopt his or her
8 direct testimony, and then be asked on further
9 direct right then have you read the other side's
10 testimony? Yes. Tell us what's wrong with it. To
11 save the rebuttal. That may mean having a greater
12 gap between the filing of the prefiled testimony and
13 the start of the hearing, but it seems it would make
14 the hearing go much more smoothly.

15 I think we tentatively agreed on that
16 last fall. Is everyone still in favor of that? Mr.
17 Gaukler?

18 MR. GAUKLER: Yes, we did tentatively
19 agree on that. I think that's a good idea that when
20 we introduce the prefiled testimony, we would at
21 that point ask the witness in rebuttal to the
22 prefiled testimony of the other side and address
23 that at that point in time.

24 CHAIRMAN FARRAR: So we have in effect
25 saying here's what I believe and here's why I

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1 believe the other side is wrong?

2 MR. GAUKLER: Right.

3 CHAIRMAN FARRAR: Ms. Chancellor?

4 MS. CHANCELLOR: Yes, we're willing to
5 give it a try, Your Honor.

6 CHAIRMAN FARRAR: Mr. Turk?

7 MR. TURK: Certainly, Your Honor

8 CHAIRMAN FARRAR: All right.

9 ANNOUNCEMENT: Your conference is
10 scheduled to end in 15 minutes.

11 CHAIRMAN FARRAR: I think we just had an
12 announcement from the operator that we had 15
13 minutes, but we had previously arranged more time.
14 So let's plug ahead.

15 Well, given that Ms. Chancellor said
16 they had a brief due on the 26th, and given that we
17 don't have the staff review imminent, let's push --

18 MR. GAUKLER: Your Honor, right now I
19 have plans to be out of the country the week after
20 that.

21 CHAIRMAN FARRAR: The week of the first?

22 MR. GAUKLER: Yes. And so I would not
23 object if the state requests an extension to their
24 February 26th filing with the Commission. The
25 potential of doubling up with respect to preparing

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1 for your TT, it might make more sense to cut back a
2 little back as opposed to pushing back the oral
3 argument on TT.

4 MS. CHANCELLOR: If we don't have to
5 travel, I don't believe we'll need an extension.
6 But I'll call in my chips if I need to, Mr. Gaukler.

7 CHAIRMAN FARRAR: All right. Then let's
8 tentatively plan our next call, which will be a
9 three or four hour oral argument and scheduling
10 discussion, at 1:00 eastern on Tuesday the 24th.

11 And, Ms. Chancellor, as I understand
12 what the Commission is doing, in the interest of
13 efficiency they want to make sure they have all the
14 other issues in the case decided before we decide
15 this issue. I would think that the Commission would
16 then be amenable some I would think they're going to
17 finish those issues before we finish this, you can
18 cite this part of the transcript in saying we would
19 urge the Commission to let us move forward with this
20 oral argument and scheduling in our part of the case
21 by deferring your brief in front of them, because I
22 think they are on a faster track right now than we
23 are. It's more likely.

24 I mean, after you file your brief and
25 the other side files its brief, they'll be ready to

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1 start writing a decision. We, of course, will not
2 be ready until after a hearing, which is some months
3 down the road. So if you get an extension from --
4 Mr. Turk, you would support that kind of extension?

5 MR. TURK: I would not oppose it.

6 CHAIRMAN FARRAR: That's not what I
7 asked.

8 MR. TURK: Support it if they want it.

9 CHAIRMAN FARRAR: Okay. And Mr.
10 Gaukler, you said you would support it?

11 MR. GAUKLER: Yes.

12 CHAIRMAN FARRAR: All right. Then, Ms.
13 Chancellor, you're welcome to cite this portion of
14 the transcript if you need an extension from the
15 Commission of your February 26th date in order to
16 get yourselves good and ready for the February 24th
17 conversation with us.

18 MS. CHANCELLOR: Thank you, Your Honor

19 CHAIRMAN FARRAR: Good suggestion there,
20 Mr. Gaukler. Thank you.

21 Anything else? Any principles on
22 scheduling that we could take up now that would help
23 you get ready to talk amongst yourselves or to be
24 thinking about scheduling for the next conference?

25 MR. GAUKLER: I can't think of anything.

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1 I guess my idea was just to try to follow the
2 schedule that the Board had set last fall in terms
3 of what we try to achieve.

4 CHAIRMAN FARRAR: You mean the time
5 intervals?

6 MR. GAUKLER: Yes, time intervals.

7 CHAIRMAN FARRAR: Yes. Okay.

8 MR. GAUKLER: So I assume the state and
9 the staff are in the same frame of mind. We should
10 be able to work out once we know when the staff's
11 review will be done and also the question of being
12 able to do some depositions or not.

13 CHAIRMAN FARRAR: Well I think, Mr.
14 Gaukler, we're trying to make some gains there that
15 under the schedule that day zero was the staff's
16 report.

17 MR. GAUKLER: Right.

18 CHAIRMAN FARRAR: And we're in fact
19 trying to get some things before day zero.

20 MR. GAUKLER: Exactly right.

21 CHAIRMAN FARRAR: But other than that,
22 you're right. That basic outline is what we would
23 expect you all to follow.

24 MS. CHANCELLOR: Judge Farrar, could we
25 go back to TT for a second?

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1 CHAIRMAN FARRAR: Yes, ma'am.

2 MS. CHANCELLOR: I'm still a little
3 confused about the questions that Judge Lam
4 presented in the sense will part of the argument be
5 whether this a sua sponte issue and you need
6 Commission guidance or I mean do we need to prepared
7 for seismic and thermal and then only be told no,
8 this is a sua sponte issue and we can't address it?

9 CHAIRMAN FARRAR: No. Let me restate
10 what I think we want.

11 You're raising an issue about this
12 change and how it effects the aircraft consequences
13 issue that we're dealing with. Judge Lam is saying
14 that the change the applicant has proposed and that
15 is part of the subject of the staff review raises
16 concern in his mind not only about the issue you
17 raised, but about the two issues he has been on a
18 board that has decided them.

19 In other words, if you were right on
20 your contention -- on financial, if you're right on
21 your contention, merits of your contention, he's
22 concerned about the financial implications, that
23 being a decision he participated in. Whether or not
24 you're right on your contention, he is expressing
25 concern that at the seismic we ruled in favor the

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1 applicant on a cask that had one design seismically
2 and now he's concerned is this cask with the
3 changes, is that a different seismic design. So
4 that's not something that you need to get prepared
5 for, then that the other parties need to -- he's not
6 going to ask you to address the financial or the
7 seismic. He is in effect raising that question for
8 the other parties to tell him he need not worry
9 about that or here's their answer to it, or that
10 that's sua sponte review and he has no business
11 doing it. But what we would also want to know is if
12 we agreed with that, that he has no business raising
13 that since he was on two boards that decided that,
14 is that something that we have to at least bring to
15 the Commission's attention. You know, that they
16 need to know about this, either to do something
17 about it themselves, to tell us to mind our own
18 business, or to tell us to address it.

19 ADMIN. JUDGE LAM: That's exactly right.

20 Ms. Chancellor, as Judge Farrar was
21 saying, the two concerns I have has to deal with the
22 two decisions that I have my signatures on. One is
23 this financial qualification, the other one a
24 seismic contention.

25 The issue raised by your contention TT

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1 is meritorious with perhaps with an impact on two
2 decisions that I participate on earlier. That I
3 would like to hear inputs on.

4 And the third question on sua sponte is
5 if these two concerns that I have are bone fide sua
6 sponte issues, then we know what to do with sua
7 sponte issue and Commission guidance will be
8 necessary for us to proceed.

9 MS. CHANCELLOR: Okay. But you want a
10 discussion of the application of this new cask
11 design to those two previous decisions, and you want
12 that addressed in the next prehearing conference
13 call. That was my question. The question wasn't why
14 you wanted it, but whether we will actually be
15 addressing it in the next conference call.

16 CHAIRMAN FARRAR: Well, we would be
17 addressing it at least initially. In other words--

18 ADMIN. JUDGE ABRAMSON: We're not going
19 to address the merits.

20 CHAIRMAN FARRAR: We're not going to
21 address the merits of it. We're going to address
22 what -- now that Judge Lam has those thoughts, what
23 if anything do we do with those thoughts. I'm sure
24 each party is going to have a different view on
25 whether we do something or nothing, or what. But I

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1 can just tell you Judge Lam is concerned having
2 signed those two decisions that, you know, is this a
3 different situation than he had before him when he
4 signed that. And I think that's a fair question for
5 him to ask. I don't know what the answer will be.

6 MR. TURK: May I ask for clarification
7 of one of those questions by Judge Lam?

8 CHAIRMAN FARRAR: Sure.

9 MR. TURK: I understand the question on
10 seismic. But with respect to financial assurance,
11 is Judge Lam's concern that the fuel may not be
12 retrievable or removable from the cask and
13 therefore, the fuel would not be shipped off site?

14 ADMIN. JUDGE LAM: That is part of the
15 concern, Mr. Turk. With our latest financial
16 qualification ruling, we ruled in favor of the
17 applicant and judging that the applicant's
18 financially qualified. That is based on the premise
19 that ultimately the fuel will be removed and shipped
20 off. Now if this latest change in contention TT
21 cast doubt on that fact, how would that impact on
22 our earlier ruling.

23 And furthermore, this is another related
24 question. In the financial litigation before the
25 contention was admitted, there were other

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1 contentions that were dismissed. And the dismissal
2 also was -- one of the reasons for the dismissal was
3 also based on this premise that ultimately that
4 there would be any spent fuel canisters sitting on
5 site. Because if they were to be spent fuel canister
6 sitting on site, the financial burden on the
7 applicant would be entirely different.

8 CHAIRMAN FARRAR: Let me do this: I
9 think that's certainly a satisfactory exposition of
10 what's on our minds. And, again, this is a thought
11 that came up. We're not saying this is something we
12 should deal with or should not deal with, but it's
13 something we want each of your opinions on how, if
14 at all, do we deal with this.

15 Let me do this. The call has been
16 extended, but it may go off the line and we have to
17 call back in. I want to do this little clean up
18 order on the contentions. Is there any urgent
19 matter someone needs to have discussed right now?

20 MR. GAUKLER: Nothing else here, Your
21 Honor.

22 CHAIRMAN FARRAR: Pardon me, Mr.
23 Gaukler?

24 MR. GAUKLER: Nothing here, Your Honor.

25 CHAIRMAN FARRAR: Okay.

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1 Ms. Chancellor?

2 MS. CHANCELLOR: No, Your Honor.

3 Nothing here.

4 CHAIRMAN FARRAR: All right.

5 Mr. Turk?

6 MR. TURK: No, Your Honor.

7 CHAIRMAN FARRAR: All right. Then we
8 will put out an order as soon as we get the
9 transcript setting all this up for a phone call 1:00
10 p.m. eastern on Tuesday, February 24th subject to
11 being able to work out the secure telephone line.
12 Well we'll keep in touch, Ms. Chancellor, with you
13 on that and feel free to try to tell the Commission
14 that we would urge the extension of your February
15 26th deadline, and so would all the other parties.

16 On what I would call the cleanup order,
17 OGD, the Environmental Justice, I can assure you
18 that was not a freudian protest that we did not get
19 out the Commission direction to dispose of it. I
20 read the Commission decision and they reversed it.
21 And I, frankly, overlooked that we were supposed to
22 carry that out. So we will do that, and the
23 Commission directive missed that contention.

24 I think the hydrology matter that you
25 all settled, I don't think we ever entered an order

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1 formerly approving that settlement, is that correct?

2 MS. CHANCELLOR: That's correct, Your
3 Honor.

4 CHAIRMAN FARRAR: But you had submitted
5 to us a written settlement, right?

6 MS. CHANCELLOR: That's correct. And
7 also for DD, ecology and species.

8 CHAIRMAN FARRAR: We got a falcon?

9 MR. GAUKLER: The falcon, yes.

10 MS. CHANCELLOR: Oh, that's right.

11 CHAIRMAN FARRAR: Entered that?

12 MR. GAUKLER: I think that was entered.
13 Yes, I thought it was.

14 CHAIRMAN FARRAR: Would you all just
15 take a look and see. Not right now, but you know
16 send an email back and forth to each other and to
17 me, and see about that.

18 And Utah, I have to ask which the
19 Commission is now reviewing, we had indicated that
20 when we made our ruling from the bench that we would
21 enter a written decision. Other matters kept us
22 from doing that. And now that the matter is on
23 appeal, we will not do that but we will note that in
24 our order that we are not going to enter a written
25 ruling and so your appeal will go forward on the

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1 oral reasons that I delivered in the hearing that
2 day.

3 So, we will enter an order taking care
4 of all these matters. Just let me know for sure
5 about that Utah DD.

6 And, of course, none of these rulings at
7 this point are substantive. They're just cleaning
8 up the record and making sure that the record
9 accurately reflects what was done.

10 Anyone have any problems with any of
11 those?

12 MR. GAUKLER: No, Your Honor, we do not.

13 CHAIRMAN FARRAR: Ms. Chancellor?

14 MS. CHANCELLOR: No, Your Honor, we
15 don't. And I'll check with Mr. Gaukler because I
16 was just chatting with Jean. We don't have anything
17 on DD, but I'll link up with Paul.

18 CHAIRMAN FARRAR: And just email us and
19 we'll include that or not include that as needed.

20 All right. Then we will terminate the
21 call at this time.

22 (Whereupon, at 5:01 p.m. the above-
23 entitled matter was concluded.)

24

25

CERTIFICATE

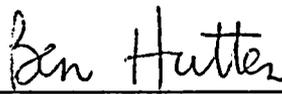
This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Private Fuel Storage

Docket Number: 72-22-ISFSI

Location: telephone conference

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.



Ben Hutten
Official Reporter
Neal R. Gross & Co., Inc.