

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 7376

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SERVED 02/19/04**

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
Michael C. Farrar, Chairman
Dr. Peter S. Lam
Dr. Paul B. Abramson

In the Matter of

PRIVATE FUEL STORAGE, LLC

(Independent Spent Fuel Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

February 19, 2004

ORDER SUMMARIZING PREHEARING CONFERENCE CALL
(Regarding Contention Utah TT, Hearing Schedule, and Related Matters)

After a four-month hiatus during which the prehearing/hearing schedule in this “aircraft crash consequences” proceeding was suspended at the Applicant’s request while it responded to NRC Staff information requests, we held a preliminary telephonic prehearing conference with the parties last week (Thursday, February 12) to plan further proceedings and to begin to frame a new schedule.¹ This Order summarizes the procedural progress made on that call and sets the stage for next week’s more substantive call, which will entail (1) hearing oral argument on late-filed Contention Utah TT and (2) setting a new schedule for the overall proceeding.

That next call is scheduled for 1:00 P.M. EST (11:00 A.M. MST) on Tuesday, February 24, subject to the availability at NRC Headquarters and in Salt Lake City of secure phones and space for the discussion of information deemed to be “Safeguards” in nature. The Board will convene at a secure location at NRC Headquarters with representatives of the NRC Staff and of the Applicant. Both those parties should notify the Board Chairman (mcf@nrc.gov) by noon the previous day of the identity of their representative(s) who will be participating. The Board will place a call from a secure NRC phone to the representatives of the State of Utah at the secure phone that they designate in the Salt Lake area.

¹ See February 5, 2004, “Order Convening Conference Call.”

The agenda for the upcoming call was set during the recently-concluded call, which dealt with six topics in all: (1) the substitution of Judge Abramson for Judge Kline (Tr. 14274-75); (2) the classification of certain materials as “Safeguards” in nature (Tr. 14276-91); (3) the disclosure by the Board of certain areas it wished to have covered in the upcoming oral argument on the State’s newly-advanced Contention TT (Tr. 14291-300, 14331-36); (4) the discussion of operating principles which would guide the parties in the reestablishment of the prehearing/hearing schedule (Tr. 14302-28, 14330-31); (5) the handling of logistics for the upcoming call, the major portion of which will involve discussion of safeguards matters (Tr. 14275-76, 14291, 14300-02, 14328-30); and (6) the need to formalize the disposition of several contentions that had been informally resolved at various stages of the proceeding (Tr. 14336, 14337-39). We recap each of those matters below, without repeating the Transcript references listed above. [Text in brackets involves matters not mentioned specifically during the call.]

1. Judicial Substitution. Judge Abramson was introduced to counsel. The Chairman then took the opportunity to express appreciation for Judge Kline’s service.

2. Safeguards Classification. The Board queried the Staff at some length about the reasons for the Safeguards classifications that were being applied to various documents. The Board’s inquiry had two purposes in mind. The first, in view of the logistical burden such classification had on all participants, was to be sure that “over-classification” was not occurring. On that score, and recognizing its very limited role in this regard, the Board determined that no steps should be taken and that the system would continue as it had been.² The second purpose was to discern whether, by reaching a clear understanding of the reasons behind the Staff’s classification decisions, it would be possible to conduct future conferences as “non-safeguards,” with all participants able to avoid direct mention of forbidden areas. The Board concluded this was not possible to do and that all future discussion of the merits of the pending issues, including the State’s new Contention TT, would have to observe safeguards restrictions.

² For its part, the Staff pledged a prompt reply to a pending State request on this topic.

3. Argument Topics. The members of the Board advised counsel as to particular aspects of the pending controversy over the admissibility of Contention Utah TT that it wished to have addressed during the upcoming telephonic oral argument. One such aspect involved the nature of the relief that might be granted if the contention were admitted and litigated, and whether there might be a form of relief that would avoid the need for litigation.

The Board also advised the parties of its concern that the Applicant's proposed change in cask fabrication, subjected to challenge by the State's new contention, also had substantive implications for the continued validity of two Partial Initial Decisions already rendered by the Board on earlier State contentions regarding financial qualifications and withstanding earthquakes. Among other things, the Board asked the parties to be prepared to address whether the Board should pursue its concerns in that regard and, if so, what steps the Board should take. [Cf. 10 C.F.R. § 2.760a and Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22-23 (1998); see also 10 C.F.R. § 2.734.]

[As the proponent of the contention, the State will proceed first at argument, followed by the Applicant and the Staff. Each party will be allotted 30 minutes for argument, which will cover the admissibility of the contention and, as noted above, the nature of possible relief and the relationship to already-decided contentions.] Accordingly, the argument should be concluded in under two hours.

4. Scheduling Principles. The Board began the discussion of scheduling by asking the Staff how soon it expected to complete its review of the Applicant's latest filing (prior iterations of the schedule used the date of completion of Staff review to begin the periods for conducting discovery, preparing testimony, and the like). When the Staff announced its review would take what the Board saw as an unexpectedly long period, the Board questioned the Staff closely but eventually demurred attempting to change that period (all recognized that the Board likely lacked any authority to direct the Staff to shorten its review time and the Staff did not pursue the Board's offer to suggest to the Commission that the Staff needed more resources for this task).

The Board then suggested that the parties put the time to be consumed by the Staff review to other good use by moving up some phases of discovery to that period. The parties agreed to discuss among themselves how that might most effectively and efficiently be done.

The Board returned to its suggestion of last Fall that its management of the hearing and its preparation of a decision would be enhanced by the parties' pre-hearing filing of an expanded version of the "Key Determinations" that proved so helpful in advance of the 2002 set of hearings. The idea has the acceptance of all, with the precise nature of the document and the exact timing of its filing remaining open for discussion.

Again with respect to a matter discussed last Fall, the parties agreed that the hearing would run more smoothly and quickly if, upon taking the stand, witnesses not only adopted their pre-filed testimony but then went on, on direct examination at that time, to express their views on the pre-filed testimony of the other parties. The alternative used during the 2002 hearings -- having witnesses re-appear later to present rebuttal testimony and to be cross-examined again -- seemed to be a less efficient and less comprehensible way to proceed. [The parties may wish to consider whether pre-filed rebuttal testimony would be more advantageous.]

Given these parameters, the Board charged the parties with negotiating a prehearing/hearing schedule to submit for the Board's consideration during the next conference call. The second portion of that call will involve attempting to put such a schedule in place.

5. Conference Logistics. The Board discussed with the parties the arrangements needed to conduct conference calls on Safeguards-related subjects. In that regard, the Board offered the continuing services of its administrative staff and of other NRC-Headquarters personnel to assure compatibility of a secure phone in the Salt Lake area. [After the call, the Board decided to split the upcoming call into two portions, the first under Safeguards protections and the second under regular procedures. This will allow the portion of the Transcript related to scheduling to be freely available, and may enable the State's representatives to move that portion of the call to a nearby, less intrusive location.]

6. Formalizing Disposition. The Board consulted with the parties as to several contentions which had been substantively resolved through a variety of means at earlier stages of the proceeding but which, procedurally, had not been the subject of formal disposition orders.³ The Board will issue a formal termination order as to all such matters as soon as the precise history of one of them is ascertained, which the affected parties undertook to check.

As reflected above, the upcoming conference call will involve two sessions: (1) oral argument on the admissibility of late-filed Contention Utah TT, to be conducted under Safeguards procedures; and (2) discussion of a new prehearing/hearing schedule, to be conducted under ordinary procedures. Once a new schedule is established, the Board will prepare another in its series of reports reviewing the reasons why the Commission's initial scheduling expectations have necessarily been superseded.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 19, 2004

Copies of this Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Southern Utah Wilderness Alliance, Skull Valley Band of Goshute Indians, OGD, Confederated Tribes of the Goshute Reservation, and the State of Utah; and (3) the NRC Staff.

³ Although it is not generally necessary to indicate broad-scale corrections to the Transcript of the conference call, we do note that line 18 on page 14338 should, of course, read "And Utah SS, which the".

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Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER SUMMARIZING PREHEARING CONFERENCE CALL (REGARDING CONTENTION UTAH TT, HEARING SCHEDULE, AND RELATED MATTERS) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of February 2004