

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 7407

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

DOCKETED 02/27/04
SERVED 02/27/04

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 27, 2004

ORDER SUMMARIZING PREHEARING CONFERENCE RULINGS
(Regarding Contention Utah TT and Hearing Schedule)

On February 24, the Board conducted a duly-scheduled conference call with the parties on the “aircraft crash consequences” aspect of this proceeding. By this Order, we very briefly summarize the outcome of that lengthy call.

1. The larger portion of the call was taken up with oral argument on the admissibility of the State of Utah’s newly-filed Contention TT, challenging certain changes in cask design proposed by the Applicant Private Fuel Storage, LLC. That portion of the call involved “Safeguards” matters and was therefore conducted on a secure phone line from secure locations, and was recorded in a transcript that will not be available to the public.

The Applicant and the NRC Staff, having conceded the timeliness of the filing of the State’s contention, argued against its admissibility on substantive grounds. Those parties’ arguments, as well as the State’s on the other side, were of the high calibre that has been customary in this proceeding.

At the end of that portion of the call and after deliberating briefly, the Board indicated that the question of admissibility was close and would thus require further deliberation. In an effort to simplify and thus to expedite the proceeding, the Board observed that the parties’ oral

arguments and concessions had suggested a possible approach that might address the State's concerns without the need for litigation.

Accordingly, the Board indicated it would defer preparation of its decision for two weeks to allow the parties to attempt to resolve the matter outside of the litigation. In that vein, the Board advised the parties that if by Tuesday, March 9, they are unable to report that they are making substantial progress toward such a resolution, the Board will prepare a decision on admissibility promptly so that, if admitted, Contention TT can be folded into the same prehearing/hearing schedule to be established for the main part of the proceeding (see § 2, below).

2. The remainder of the call involved only scheduling and was therefore conducted under ordinary (non-Safeguards) procedures, and was recorded in a transcript that will be publicly available. At the outset, the Staff indicated that, while portions of its analysis of the Applicant's proposal might be completed earlier, it did not expect to complete its full report before April 20 (Tr. 14504). In that regard, it was duly noted (Tr. 14566; compare Tr.14505) that the general agreement, expressed earlier, that the Board lacked authority to hasten that review (see Feb 12 Tr. 14315-16 and February 19 Order, p. 3, Item 4) had been confirmed by a recent Commission decision.¹

During the call, the Board discussed with the parties a number of scheduling matters, including the following: (1) identifying prehearing steps that could be moved up so as to be taken while the Staff review was proceeding, rather than thereafter (Tr. 14568-69, 14572-73); (2) noting portions of the Staff review that could be issued early (Tr. 14504, 14568); (3) eliminating witnesses on subissues that might not need to be heard at this juncture (if it proves appropriate to allow the Applicant to litigate now only the "probability of cask breach" issue while

¹ Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC ___, ___ (slip op. at 11) (February 18, 2004).

preserving the right, if it loses on that issue, to litigate “radiation dose consequences” later)(Tr. 14510-28, 14569-70);² (4) setting the length of time that ought to be allocated to each prehearing step (Tr. 14540, 14549-54, 14557-59, 14565, 14567); (5) prescribing the content and length of a more definitive version of “Proposed Key Determinations” to be filed in advance of the hearing (Tr. 14560-64); (6) omitting the time period for filing “Motions in Limine,” which at this stage are expected to be of limited utility (Tr. 14573-75); (7) evaluating the different approaches to taking rebuttal testimony more efficiently than awaiting the completion of all direct cases³ and the timing and substantive consequences of each such approach (Tr. 14538-49); (8) considering the impact on hearing length of combining issues and witness panels (Tr. 14532-34); and (9) weighing the techniques for controlling the length of cross-examination (Tr. 14535-38, 14575-76).⁴ The interchange of ideas was fruitful, with full airing of the pros and cons of various measures that would enhance the creation, in as timely a manner as feasible, of a properly developed record and decision (see Tr. 14566-68, 14579).⁵

There having been full discussion of the principles that should govern the creation of the schedule, and of the periods to be allocated to the various phases thereof, the Board charged

² See LBP-03-04, 57 NRC 69, 136 and n. 110, adverting to the potential three-part nature of the overall unified regulatory question at issue (i.e., probability of site impact, probability of resulting cask breach, and resulting excessive radiation consequences), which to this point has been described in simplified two-part terms (i.e., probability and consequences). In the 2002 hearings, we heard evidence only on the “probability of site impact” subissue.

³ The discussion covered three such approaches to rebuttal testimony: (i) including it in pre-filed written direct testimony based on knowledge gained during discovery; (ii) pre-filing written rebuttal sometime after pre-filing written direct; and (iii) presenting oral rebuttal to an opponent’s written pre-filed direct testimony at the time a witness takes the stand to adopt the pre-filed direct testimony.

⁴ The Board cited one example of particularly well-conducted cross-examination (Tr. 14575-76 [intending to refer to Tr. 4805-87, 4954-68]). Before the hearing begins, we may direct counsel to other such examples that are also worthy of emulation.

⁵ Transcript references in the above paragraph are meant to be illustrative only, for discussions of some of the listed topics were frequently intertwined with one another.

the parties -- as has been the past practice herein -- to negotiate a suitable schedule that would be responsive to that discussion (Tr. 14576-77). The parties are to advise the Board by Monday, March 15, of their progress in that regard (Tr. 14577). At that point, well in advance of the projected completion of the Staff's report (Tr. 14578), the Board will convene another call to set a firm schedule.

Based on the parties' and the Board's thoughts thus far, it appears that the hearing should be expected to require approximately four weeks (see Tr. 14532, 14534) and is likely to take place in a July-August time frame (e.g., Tr. 14564-65). When the firm schedule is set, the Board will prepare a comprehensive report describing the reasons for the revised schedule and recapping the sources of its departure from initial expectations.

As set out above, the parties will report to the Board by Tuesday, March 9, and Monday, March 15, respectively, on the outcome of their discussions on (1) the matters the State seeks to litigate through Contention TT and (2) the establishment of a schedule for the overall proceeding.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 27, 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.

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NUCLEAR REGULATORY COMMISSION

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Installation))

CERTIFICATE OF SERVICE

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

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Dated at Rockville, Maryland,
this 27th day of February 2004