

RAS 7538

Official Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION

Title: Private Fuels Storage, LLC

Docket Number: 72-22-ISFSI

Location: (telephone conference)

DOCKETED
USNRC

April 1, 2004 (11:33AM)

Date: Tuesday, March 30, 2004

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Work Order No.: NRC-1402

Pages 14581-14653

NEAL R. GROSS AND CO., INC.
Court Reporters and Transcribers
1323 Rhode Island Avenue, N.W.
Washington, D.C. 20005
(202) 234-4433

1 APPEARANCES:

2 On Behalf of the Licensee:

3 PAUL A. GAUKLER, ESQ.

4 D. SEAN BARNETT, ESQ.

5 of: Shaw Pittman

6 2300 N Street, NW

7 Washington, D.C. 20037-1128

8 (202) 663-8304

9 (202) 663-8063

10

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

12 DENISE CHANCELLOR, ESQ.

13 JEAN BRAXTON, ESQ.

14 CONNIE NAKAHARA, ESQ.

15 JAMES SOPER, ESQ.

16 of: Utah Attorney General's Office

17 160 East 300 South 5th Floor

18 P.O. Box 149873

19 Salt Lake City, Utah 84114

20 (801) 366-0286

21 (801) 366-0292 fax

22

23

24

25

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

On Behalf of the Nuclear Regulatory Commission:

SHERWIN E. TURK, ESQ.

LAURA C. ZACCARI, ESQ.

of: Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(301) 415-1533
(301) 415-3725

Also Present:

SherVerne Cloyd

Jack Guttman

Susan Lin

Robert E. Shewmaker

Michael Waters

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

1:33 p.m.

1
2
3 JUDGE FARRAR: We'll go on the record.
4 This is a very important prehearing scheduling
5 conference, the day we've all been waiting for in the
6 Private Fuel Storage proceeding. This is Mike
7 Farrar. I'm the Chairman of this Board. Judge Lam is
8 with me here in D.C. Judge Abramson is traveling and
9 is unable to call him, but we have his proxy. The
10 court reporter is here with us in our chambers as is
11 Susan Lin, our law clerk, and SherVerne Cloyd who is
12 helping administer the proceeding. Who do we have for
13 the company?

14 MR. GAUKLER: We have Paul Gaukler and
15 Sean Barnett.

16 JUDGE FARRAR: All right. Welcome
17 gentlemen.

18 MR. GAUKLER: Thank you.

19 MR. BARNETT: Thank you, Your Honor.

20 JUDGE FARRAR: For the state?

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

23 JUDGE FARRAR: Okay. Welcome to all of
24 you. And for the Staff?

25 MR. TURK: Sherwin Turk and Laura Zaccari

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 and with us are Jack Guttman, Michael Waters and
2 Robert Shewmaker.

3 JUDGE FARRAR: Okay. Welcome to all of
4 you. I think we are in a good position to make some
5 progress. Before I want to commend the parties for
6 two things, first the settlement of Contention TT
7 which I think in the Board's judgment whatever the
8 evidence would have revealed this is a good outcome
9 recognizing the State's concerns and the Applicant's
10 capabilities to deal with them and memorializing that.
11 So again this is another example of how nice it is to
12 be presiding over a proceeding like this where people
13 can solve problems in a sensible fashion. We will, of
14 course, do what we have to do to enter that
15 settlement.

16 And then thank you for getting us in a
17 timely fashion the competing schedules for the
18 resumption of the PFS hearing. I think there may be
19 at least four things we need to deal with today.
20 First is this question of what is and is not going to
21 be litigated, but then we would also like to hear from
22 you on the other issues how we can best subdivide
23 those into two, three or four main issues that would
24 help us get our arms around the case.

25 Second, the number of witnesses you have

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 on each of those issues and we are leaning seriously
2 although we're open to be dissuaded to the notion of
3 an overall allotment to cross examination time for
4 each side to use as it sees fit. So let's tackle
5 those and anything else that you all want to get into.

6 The first question then I guess is some of
7 the difference in the schedule comes down to
8 litigating or not the so-called radiation dose
9 consequences and criticality matters. Ms. Chancellor,
10 do you want to tell us why you believe those should --
11 Well, let me state the case for anybody reading this
12 transcript. There is one way to divide the aircraft
13 accident part of the case is into three parts of a
14 unified regulatory question, what's the probability of
15 site impact which we decided, the probability of
16 resulting cask breach which will be one of the issues
17 in the hearing and then the third question, the
18 resulting excessive radiation consequences. That
19 would be the third step. Ms. Chancellor, do you want
20 to tell us why you think that third step either the
21 way I stated it or stated some other way should be
22 litigated?

23 MS. CHANCELLOR: Certainly, Your Honor.
24 I'd like to step back to when we were filing joint
25 reports after you issued the decision on probability.

1 If you will recall in April 30 joint report, the State
2 argued as it did in the March 31 report that PFS must
3 amend its license application. It must undergo Staff
4 review and that Utah has to file new contentions.
5 Both the Staff and PFS took the position that
6 consequences were not beyond the scope of Contention
7 Utah K and that there was no need to file a new
8 contention.

9 Then we get to the Commission's decision
10 CLI-03-05 on May 28, 2003 and that dealt with PFS's
11 appeal from your decision LBP-03-04. PFS appealed on
12 three grounds, first that 4.29×10^{-6} was close
13 enough, that the Board committed error with respect to
14 the R factor and that the Board also committed error
15 for failure to admit evidence that there would be no
16 harmful radiation release if the site were hit.

17 The Commission rejected PFS's appeal that
18 the Board erred in not admitting the evidence on
19 consequences. It cited to the March 31 report that
20 PFS and the Staff were both prepared to go forward
21 with the consequences' proceeding and the Commission
22 held the other two issues in abeyance because those
23 two issues were fact-based, but more particularly
24 because the Board had not completed its risk inquiry.
25 Specifically the Board is still considering the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 consequences aspect or risk, the Commission said.

2 The Commission refers to the Board's
3 ultimate determination of risk. That is after the
4 consequences' ruling. The important language in CLI-
5 03-05 is the following: "If PFS successfully
6 demonstrates at the anticipated hearing that the
7 posited crashes would not penetrate the cask or even
8 if they did would be unlikely to cause release of
9 dangerous levels of radiation. The overall risk is
10 satisfactorily low." So the Commission said that it
11 was holding two appeal issues in abeyance until the
12 record was complete and available to it. That
13 complete record as we read the Commission's decision
14 includes whether there's going to be dangerous levels
15 of radiation.

16 In May 29 prehearing - this was where we
17 were back in D.C. after the mini-cask reconsideration
18 issue - we got into a discussion as to whether the
19 State could make its case through cross examination or
20 whether we had to file expert reports. Mr. Gaukler
21 made the point that if we were going to file expert
22 reports such as those we used in the past by Dr.
23 Resnikoff meaning consequences or if we're going to do
24 something independently, the State needed to file
25 those expert reports and give PFS the opportunity to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 review that.

2 I would like to note that the Intervenor
3 has the burden of going forward with evidence to
4 support its contention either through direct evidence
5 or by cross examination. That's well established case
6 law. It goes back as far as Limerick 1 NRC 153. Utah
7 identified its witnesses on September 5, 2003. Utah
8 filed its expert reports on September 18, 2003, on
9 time as the Board had scheduled including reports by
10 Dr. Thorne on criticality and Dr. Thompson on
11 radiation dose consequences. Utah put substantial
12 resources and efforts into finding those experts, into
13 producing those reports.

14 Now if you want us to forego that effort,
15 we believe that that is totally unfair. PFS and the
16 Staff have had more than adequate notice of what the
17 theory of the State's case is. The theory of our case
18 is there will be penetration and there will be
19 consequences in the form of unacceptable radiation
20 doses and the potential for criticality. We believe
21 that if those issues are not heard, it substantially
22 affects our ability to present the best case that we
23 can to the Board.

24 I would note that neither PFS nor the
25 Staff has really accepted the Board's probability

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 ruling. The only reason we are here is because the
2 State has brought forth these issues of penetration,
3 dose and criticality. It was really only at the last
4 conference call that PFS made it clear that it was not
5 its desire to go forward with radiation and
6 criticality.

7 If you look at the schedule, there's only
8 a couple of weeks difference between trying radiation
9 and criticality now. Whereas PFS will probably argue
10 that it will take a year later on and in fact PFS has
11 said it has no intention of putting on a case on
12 criticality in the future. It intends to go to the
13 Commission and make its case to the Commission that it
14 doesn't need to do radiation and criticality.

15 Just because we have this ruling that we
16 didn't have to file a contention, now we're in this
17 situation where we had proceeded along the lines that
18 this is how we structured our case and that it
19 wouldn't be a level playing field if you allowed PFS
20 or the Staff to shape the way they perceive the
21 hearing. If you look at the issue of probability and
22 consequences, the risk is probability times
23 consequences. PFS is serious that there will be zero
24 consequences. If they wish to stand on that theory,
25 they do so at their peril. Our position is that there

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 will be consequences and that's the case that we think
2 we should have the ability to put on.

3 JUDGE FARRAR: Ms. Chancellor, that was
4 very well presented. Let me ask you a question.
5 Maybe the Company will tell us differently, but I
6 thought the issue was their willingness at this point
7 to concede that if they fail to show there would be no
8 cask breach, that is, if we find that there would be
9 a cask breach, that at that point they've lost because
10 they have by not putting on any evidence at this
11 juncture conceded at least for now that there would be
12 sufficient consequences that we would call it a bad
13 thing, a bad enough consequence, so they could not
14 proceed with the facility. Am I missing something
15 there, Ms. Chancellor?

16 MS. CHANCELLOR: Yes, you are, Your Honor.
17 I think if you go back and read the transcript last
18 time, Mr. Gaukler was so good. He wanted to certify
19 to the Applicants that PFS -- I think this is a moving
20 target here. We never really nailed it, never pinned
21 this issue to the wall that PFS is not willing to
22 concede - and you can ask them this - that if we
23 prevail and show that there is penetration that they
24 concede that there are consequences. What they say is
25 "Well, maybe we can go back and find other

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 probability. Look at some of those unanalyzed event
2 probabilities."

3 And we feel also that it would -- Just a
4 second. Sorry. I lost my train of thought. We feel
5 that in order to make our case that we can make a
6 better case if we show that there are radiation
7 consequences and criticality. If the case is closed,
8 that may tip the scale. Then you're also left with
9 the lack of complete record that the Commission is
10 expecting as it said in its May order.

11 JUDGE FARRAR: Okay. That's a good point
12 to focus on. Are we dealing with two competing values
13 here? On one hand, the Commission said as here and in
14 other cases we want this case wrapped up. This has
15 been going on a long time. We want it wrapped up
16 quickly. That's partly a good way of doing business,
17 but it's partly the historical Commission view,
18 Congressional view, that companies are entitled to
19 have these proceedings to have a decision on their
20 application.

21 So to the extent that the Commission says
22 wrap this up, get it over with, there is some culture
23 behind that, and not unfairly, that is trying to make
24 sure the Applicant doesn't get kept waiting for years
25 and years unnecessarily. On the other hand, if the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Company comes in and says "We don't mind putting off
2 the bites here," yes, in a perfect world, you do all
3 three together. But if we do them one after the
4 other, the only person being hurt by the delay of
5 putting the third bite off is the Company. Usually
6 they are anxious to have all their bites quickly.

7 But there is this notion that they can
8 always go back to the drawing board, revise their
9 application. So how do you reconcile these two
10 cultures, one that the Company is entitled to in a
11 reasonably rapid decision and if the Company is the
12 one that suffers by delay and if they want to bring
13 delay on themselves, so be it?

14 MS. CHANCELLOR: I think this is a false
15 dilemma, Your Honor. If we had gone through the
16 traditional process, if PFS had amended its license
17 application, if Staff had reviewed it and Utah had
18 filed contentions, our contention would have
19 explicitly stated that there would be a breach, that
20 PFS has failed to demonstrate that the site is safe,
21 that there would be unacceptable radiation
22 consequences and potential for criticality. That is
23 the contention that is at issue here.

24 JUDGE FARRAR: Okay, but aren't they
25 conceding that for purposes of bite 2? If I'm

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 correctly understanding what the Applicant is going to
2 say, they are going to say give us bite two and for
3 present purposes, we will concede. We lose on bite
4 three?

5 MS. CHANCELLOR: No, I don't think they
6 are, Your Honor. I think that's maybe what we need to
7 nail down because --

8 JUDGE FARRAR: Okay, then why -- Go ahead.

9 MS. CHANCELLOR: The culture is also that
10 the Intervenor shapes its case. It goes forward with
11 its case and then the burden shifts to the Applicant
12 and the Applicant then has to defend against what the
13 Intervenor comes forward with. What we have come
14 forward with penetration, criticality and radiation
15 doses.

16 To bifurcate this yet again gets us still
17 back into the probability part of the hearing and not
18 to the consequences. I've looked at the record. I've
19 spoken with Mr. Gaukler. I do not believe that PFS
20 concedes that if we show penetration ergo there is
21 unacceptable radiation consequences.

22 JUDGE LAM: Now, Ms. Chancellor, this is
23 Judge Lam. When you are talking about those
24 consequences and criticality issues, presentations
25 that you intend to make, are these related to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 scenarios that have probabilities higher than 10^{-6} or
2 are they some scenario that your experts are
3 constructing that are below the probability threshold?

4 MS. CHANCELLOR: I think the cumulative
5 probability, Judge Lam, on our penetration comes to
6 10^{-6} . I never know which way to go on 10^{-6} , exceeds 10^{-6} .
7

8 JUDGE LAM: So you intend to present your
9 case based on scenarios that have probability
10 exceeding 10^{-6} and demonstrate the consequences in
11 terms of doses and criticality --

12 MS. CHANCELLOR: That is correct.

13 JUDGE LAM: -- are not acceptable.

14 JUDGE FARRAR: Ms. Chancellor, when you
15 characterize the issue of whether this is probability
16 or consequences, I don't have our March 10 opinion of
17 a year ago in front of me, but I thought we had a
18 footnote that said that second step could be --

19 MS. CHANCELLOR: I have it in front of me.
20 It's footnote 110.

21 JUDGE FARRAR: -- that it could be
22 characterized one way or the other depending on how
23 you were generally describing the issue.

24 MS. CHANCELLOR: But if I could read the
25 language. "Cask penetration was spoken on a few

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 occasions of constituting part of the accident
2 probability question when the accident is defined as
3 cask breach by a crashing aircraft or on other
4 occasions as part of dose consequences evaluation when
5 the accident is defined as it most often has been here
6 as the cask impact by such an aircraft." So your
7 footnote makes it clear that it most often defined as
8 cask impact and that --

9 JUDGE FARRAR: Yeah, but doesn't it --

10 MS. CHANCELLOR: -- and that the three
11 part scenario is not as this has been used in this
12 proceeding that was always talked about probability
13 and consequences when we talked about bifurcating this
14 at the beginning. In the motion in limine, it was our
15 understanding that we would be able to put on a case
16 on consequences. When we went to the Commission
17 complaining about the standards, that the standards
18 should be 10^{-7} and not 10^{-6} , part of the reason for
19 rejecting that was because we didn't make a case on
20 consequences.

21 JUDGE FARRAR: But that footnote --

22 MS. CHANCELLOR: At no stage have we yet
23 gotten an opportunity to make our case on
24 consequences.

25 JUDGE FARRAR: Another way of looking at

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that footnote is that it gives us the flexibility to
2 define the case the way that makes the most sense and
3 I guess my question would be given where we are now,
4 does it make the most sense to take up question two
5 separately because one of two things will happen. The
6 Company will prevail on question two and because then
7 the accident is improbable or incredible, we don't
8 need to get to question three. They win conceding
9 that if we ever got to question three you would
10 prevail.

11 Or the Company loses on question two and
12 then they seek to come back on question three. And we
13 will have run a more efficient and shorter and more
14 focused hearing now and that any delay brought about
15 by having to wait another lengthy period to get to
16 issue three is on the Company's head, but they brought
17 it on themselves. They can hardly be heard to
18 complain and now there's a further delay in this
19 proceeding even though the Commission didn't want a
20 delay. If they say to us in effect, we are happy to
21 have the delay. Let's simplify this hearing and get
22 it over as fast as we can.

23 MS. CHANCELLOR: Beg to differ, Your
24 Honor. What we're talking about is two extra weeks in
25 the schedule, three at most. That seems to me the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 most efficient way to run this proceeding. We have
2 had experts on retainer for a couple of years now and
3 you expect us to retain these experts with the
4 expectation that maybe in another year we will get to
5 criticality and radiation doses.

6 Furthermore, we have our marching orders
7 from the Commission that it wants a complete record so
8 that it can decide the entire panoply of appeals that
9 it's going to get. I still keep coming back to PFS if
10 it -- Let me make another point first. Certainly you
11 are right. If PFS prevails on the penetration, that
12 penetration doesn't come within the 10^{-6} probability,
13 but that's not preordained. That's what this hearing
14 is all about. We shouldn't go into this hearing
15 thinking that they are going to prevail on that issue.

16 JUDGE FARRAR: I can assure you --

17 MS. CHANCELLOR: Oh, I'm not criticizing
18 you, Judge Farrar. I know you wouldn't do that. But
19 we're going to have the opportunity at some stage to
20 make our case and PFS will go to the Commission and it
21 will argue. If it loses on penetration and we don't
22 try criticality, it will argue "Oh, no, we can't delay
23 another year and it will be too long before we can get
24 our license."

25 JUDGE FARRAR: Suppose we extract it from

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 them as a condition to only hearing part two that they
2 would forego any interlocutory appeal on part two and
3 turn back and now it's your turn to have your innings
4 and do part three. Would that be a fair concession to
5 ask of them if we were to disagree with you?

6 MS. CHANCELLOR: Depends on how well you
7 nail them to the wall, Your Honor. I just don't think
8 this issue has ever been nailed down. PFS always has
9 the right to go to the Commission.

10 JUDGE FARRAR: Not if as a part of case
11 management in getting this thing on the right track or
12 tracks, we say we will do this. This makes sense if
13 and only if the following conditions are adhered to.
14 Now Judge Lam has something and then we'll ask.
15 You've made an eloquent argument here for doing the
16 whole case, but let's hear from Judge Lam for a
17 moment.

18 JUDGE LAM: Well, Ms. Chancellor, if you
19 are reasonably confident that the consequence from
20 radiation doses and criticality are indeed related to
21 likely accident scenarios which have probability
22 exceeding 10^{-6} , I think your case is solid. However,
23 if radiation dose consequences and criticality are
24 related to unlikely scenario which I would say way
25 below 10^{-6} , then perhaps this is not the right time to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 hear them. One analogy is I know for sure a meteorite
2 strikes at that facility would release unacceptable
3 radiation dose consequences and may even create
4 criticality issue beyond imagination, but that
5 probability is probably ranked at about 10^{-10} , 10^{-12} .
6 So there is no need to examine the radiation dose
7 consequences for that scenario.

8 The key here I think is are your experts
9 reasonably certain that the scenario related to
10 radiation dose consequences and criticality are
11 reasonably high by which I mean exceeding 10^{-6} . If
12 indeed they are, then I would certainly think they
13 should be heard at this time.

14 MS. CHANCELLOR: Judge Lam, I think if you
15 look at the expert reports that the State's has by
16 very credible experts that they are confident that
17 there will be penetration, that there will be
18 unacceptable radiation release and that there will be
19 the potential for criticality within the 10^{-6} bounds
20 or somewhere in that vicinity with respect to
21 criticality. That is the case that we have presented
22 to date.

23 I don't think that anybody has suggested
24 that the State's reports are just a bunch of trash.
25 That if you look at those reports, there are credible

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 scenarios in there that show penetration. The problem
2 we have here is PFS is going in one direction
3 presenting their case with respect to unanalyzed event
4 probabilities being less than 10^{-6} and we're going in
5 the other direction showing within 10^{-6} there are
6 these unacceptable consequences.

7 So we are going in diametrically different
8 directions. We feel that we can make a very strong
9 presentation that within acceptable bounds there will
10 be penetration such that there will unacceptable
11 radiation release and potential for criticality.
12 That's our case of breach.

13 JUDGE LAM: Thank you.

14 JUDGE FARRAR: Ms. Chancellor, you've
15 stated this very powerfully and eloquently for which
16 we thank you. We're not surprised, but thank you for
17 stating it. Mr. Gaukler, you've heard Ms.
18 Chancellor's arguments. You've heard our questions.
19 So we'll turn the floor over to you and during the
20 course of your remarks, I hope you will address just
21 what we do with the Commission mandate if I can
22 paraphrase them "wrap this up by the end of 2003."
23 How happy are they going to be if we say "Well, we
24 think we'll wrap it up by 2004, but depending on how
25 it comes out, we may have to have another proceeding

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 in 2005." Is that inconsistent with the directions
2 they've given us?

3 MR. GAUKLER: I think the Commission was
4 focused on getting this case over as quickly as
5 possible within a reasonable range. If we had known
6 back last year that this part of the proceedings was
7 taking so long, we probably would have requested the
8 Commission to go ahead on the probability part of this
9 case.

10 In terms of what we believe is
11 appropriate, we believe it's appropriate to hear the
12 structural issue at this point in time for various
13 reasons. The same rationale that led the Board to
14 exclude both the structural and radiological dose
15 consequences in the spring of 2002 apply here. It's
16 premature to consider the criticality and radiation
17 dose issues because if we win on the structural as the
18 Board notes, the issue of dose and criticality is
19 moot.

20 The State is not prejudiced in any way
21 because if it's correct in terms of a breach of a cask
22 with less than 10^{-6} , its witnesses will establish that
23 and then the litigation of the consequences will be
24 another day, those consequences. At this point in
25 time --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE FARRAR: But they claim their
2 prejudiced because they've put resources and effort
3 into signing on these witnesses, working with them and
4 they are ready to go and may be like anything in the
5 law, you wait. That's why we have statutes and
6 limitations. You wait too long and people go away or
7 they are not interested or something. So they are
8 saying that there's prejudiced to them from having
9 gone ahead and now we say "It's nice that you went
10 ahead, but just put all of that on hold for a year."

11 MR. GAUKLER: I don't think that's going
12 to be the case in the sense that we'll be prejudiced
13 too if we have to go ahead and present this part of
14 the case when we don't think it's necessary at this
15 point in time in terms of cost and expenses. That is
16 part of the litigation of issues.

17 JUDGE FARRAR: So let me paraphrase what
18 you just said. Are you saying that in terms of a
19 Commission mandate to be efficient, we have two
20 choices here? We can be real efficient on issue two
21 and if you win, then we've done it as efficiently as
22 possible. And if we go ahead with both issues, that
23 could be inefficient because it could take a much
24 longer time. Those are the easy cases.

25 How about the case where we go ahead, look

1 very efficient on issue two, you lose and now we have
2 to come back? The Commission will be able to say to
3 us "That was an inefficient way to do things. You
4 should have done the whole thing at once." Or are you
5 willing to say that from your point of view, you being
6 the people hurt most by delay, you're willing to
7 accept the risk of that issue three delay?

8 MR. GAUKLER: We're willing to accept
9 issue three delay, but we would probably take an
10 appeal with respect to issues one and two up to the
11 Commission before even thinking to go back to issue
12 three. We feel that's the most efficient way to
13 handle this case in terms of all three issues. As the
14 Board noted in its decision, there is basically two
15 approaches that you used in terms of this decision
16 describing how an applicant could prove its case with
17 a respect to credible actions.

18 Let me clarify. There is actually three
19 as clarified in Dr. Cornell's report and there's
20 really three quite distinct issues. One is the
21 probability of a crash. Two is the structural
22 consequences of a crash or would there be any breach.
23 Three only if you go through the first two
24 possibilities is the radiation dose consequences. We
25 believe that the Board does not have before a complete

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 record of radiation dose consequences.

2 Important to the Board before getting into
3 this issue were two things. One is the Staff had done
4 no report with respect to any type of consequences and
5 the Board was loafed to go forth into the area of
6 consequences without further detailed review of the
7 Staff. The Board noted obviously that it's not
8 compelled to go along with the Staff, but they found
9 Staff analysis to be very useful.

10 If we go forward with radiological doses
11 consequences here, you would go forward with no
12 analysis by the Staff or PFS on its own. You would be
13 limited to cross examination and some rebuttal
14 testimony with respect to particular points raised by
15 the State.

16 JUDGE FARRAR: Wait, but the State says
17 this is their contention. They put you on notice that
18 they were going ahead and I guess they would say shame
19 on you for not having responded.

20 MR. GAUKLER: Well, I think that an
21 applicant is entitled to set forth the position he
22 thinks by which to go forth with his licensing
23 position efficiently and expeditiously. In terms of
24 the initial contention itself, the initial contention
25 itself was one PFS had failed to evaluate or analyze

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 whether various events are credible or not.
2 Consequences were included in that in the fact that
3 consequences as the Board knows are part of this
4 unified single question albeit we approach it in
5 discrete parts.

6 JUDGE FARRAR: Well, that last that you
7 said Mr. Gaukler, you're going back to the original
8 contention.

9 MR. GAUKLER: Going back to the original
10 contention.

11 JUDGE FARRAR: Do you have that in front
12 of you by any chance?

13 MR. GAUKLER: Yes, I do.

14 JUDGE FARRAR: Could you read it to me?

15 MR. GAUKLER: I was looking at the basis
16 etc. Let me read the contention itself.

17 JUDGE FARRAR: Well, which ever part of it
18 touches on what's in front of us now.

19 MR. GAUKLER: The contention is that the
20 "applicant has inadequately considered credible
21 accidents caused by external events in facilities
22 effecting the ISFSI intermodal transfer site and
23 transportation corridor along Skull Valley Road
24 including the accumulative effects of nearby hazardous
25 wastes in military testing facilities in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 vicinity." So basically that's the contention and the
2 basis of the contention was to point out that the
3 State alleges that PFS failed to consider whether
4 certain events were credible or if properly evaluated
5 whether they were credible or not. It did not get
6 into radiation dose or criticality albeit as Your
7 Honor noted in your decisions last March, that's part
8 of the unified question. But the focus of this basis
9 was whether or not there was a credible event.

10 Now in terms of going back to what I was
11 saying is I believe there are three basic issues
12 involved in the ultimate unified question. We've
13 litigated one. The record is complete. And that will
14 be on appeal if and when we get up on these other
15 issues. We have issue no. two now which we are
16 litigating right now. We have reports by the State
17 and PFS. We will have reports by the Staff very
18 shortly. The record will be complete after we go
19 through on that.

20 In terms of radiological dose and
21 criticality, the Board will not have a complete record
22 as we talked about in its initial decision March 10
23 last year in two respects. (1) You're not going to
24 have any independent Staff analysis of the issue
25 because the Staff I believe concurs with PFS that it's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 not necessary to reach that issue because the
2 consideration, the structural issue, was moot. (2)
3 The nature of the record would not be fully developed.

4 JUDGE FARRAR: But haven't both you and
5 the Staff ignored the Commission's instruction that
6 this whole thing? They wanted a complete record and
7 the whole thing wrapped up. I don't remember a
8 footnote in their decision that said we want a
9 complete record, footnote except insofar as the
10 Applicant and the Staff deem that we don't need a
11 complete record. They told us get a complete record.

12 MR. GAUKLER: You will have a complete
13 record with respect to two issues. I think that both
14 the Staff and Applicant believe that those issues are
15 moot in consideration of the third. That at this
16 point in time that's the most efficient way to proceed
17 in terms of reaching the ultimate objective of the
18 Commission, in terms of reaching the decision as
19 quickly as possible, to get an answer back to the
20 Applicant as quickly as possible and Applicant
21 recognizes that if we go up on one and two without
22 having litigated three and the Commission denies our
23 appeal on one or two, we certainly have engaged
24 extensive lengthy delay. What we do at that point is
25 up to us, but the delay will be our fault at that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 point and nobody else's.

2 JUDGE FARRAR: I take it then you would
3 reject my proffered compromise that if we just did two
4 you would agree to forego an appeal if you lost until
5 we litigated three.

6 MR. GAUKLER: That's correct, Your Honor.
7 We would be afraid that we would get into another
8 potential lengthy proceeding on the third issue. One
9 reason the Commission I think directed the parties to
10 go forward as it did without hearing the appeal was it
11 thought that based on the decisions that have been
12 filed by both PFS and State that consequences would be
13 relatively simple to go forward and to be resolved
14 relatively expeditiously.

15 As the Board and the parties have found
16 out that's not been the case. I think that
17 criticality and radiation dose if one would really get
18 into it and look at closely would be just as
19 complicated as the structural issues that proved out
20 to be. PFS would much rather go forward with the
21 issues that are forward and litigate it. The decision
22 which we would agree would be favorable, but if it's
23 not favorable, then we recognize that there would be
24 delay in order to go back and litigate radiation dose
25 and criticality or go back and redesign the cask or

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 whatever option we may choose at that point in time.

2 JUDGE LAM: Mr. Gaukler, this is Judge
3 Lam.

4 MR. GAUKLER: Yes.

5 JUDGE LAM: Assuming you are right that
6 you would prevail on the probability of a structural
7 integrity of the cask, assuming you are right,
8 therefore those consequences and criticality results
9 only would apply to accident scenarios which are
10 deemed improbable and below a 10^{-6} threshold. Now in
11 that case, what harm would it be to your case by
12 having only the results presented by the State? That
13 should not help the case though, should it?

14 MR. GAUKLER: It doesn't harm our case in
15 terms of albeit that structural integrity is probably
16 at the breach of a cask is less than 10^{-6} . If we were
17 wrong in that case, we would have given up the ability
18 to going back and presuming what we think their
19 analysis show are incorrect results in the State
20 analysis, etc.

21 JUDGE LAM: I see. So that is your
22 concern.

23 MR. GAUKLER: I believe that in terms of
24 the approach that is implicitly recognized by the
25 Board in its initial decision of those kind of steps

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 or approaches in this process and that involves that
2 there are three steps or approaches in this process,
3 that it makes sense to look at those steps
4 individually before going forward to the next one.
5 The whole question of what type of consequences you
6 would get from a breach is not yet defined. It seems
7 to be not an efficient use of resources.

8 It would be much better to define what you
9 think the nature of the breach might be before you
10 went in and tried to determine the consequences in
11 terms of radiation dose and criticality. But do all
12 those reasons suggest for us to go forward and do the
13 structural integrity and it would be the most
14 efficient way to enable a decision born within the
15 least time is one that PFS then if it were not to
16 prevail would in all likelihood, 99.9 percent, take
17 the first and second decision up on appeal.

18 As a licensee we would have the right to
19 come back and change something either in terms of the
20 design or seek to litigate those at some point later
21 in time. But we recognize that if we lose on issues
22 one and two as delay is laid out at our boots or laid
23 it out as our doorstep.

24 JUDGE FARRAR: Let me ask you this, Mr.
25 Gaukler. Would it be a sensible compromise to say

1 "All right. We'll just litigate issue no. two, but
2 we're going to allow the State to put on the record
3 what it thinks the results on issue no. three would
4 be. We would make no finding of course that that's
5 what would happen on issue three if we ever got to
6 issue three. But this would allow them to spread on
7 the record the work that they have done thinking they
8 were getting ready for litigation.

9 Obviously we have to be very careful in
10 how we spell that out. You know the Company lost
11 issue one, but that's subject to appeal. We're now
12 litigating issue two and one of the reasons we're
13 litigating issue two is the State has this concern
14 that if the accident were credible, here is what the
15 State thinks the consequences would be. Now that's
16 not what the Board necessarily thinks. We've not
17 gotten to that yet, but that would give them a chance
18 to put the work they've done on the record. Would
19 that be a fair approach?

20 MR. GAUKLER: I would hate to have it put
21 on the record. It's already part of the docket for
22 the proceeding and it's already part of the record in
23 that broad sense of the word. To put it in the
24 evidentiary record I think would not be appropriate.

25 JUDGE FARRAR: Not so much the -- It would

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 be not part of the evidentiary record, but it would be
2 given some status beyond the fact that they have
3 submitted it and exchanged it with parties. There
4 would be some recognition taken that this is the
5 position they will take if and when we ever get to
6 issue no. three.

7 MR. GAUKLER: I think that's inclusive
8 already in the fact that they gave it to the Staff and
9 we'll filed it with the Board albeit it was exchanged
10 with the parties on this case. We have put it on the
11 docket and it's essentially part of the docket I
12 guess. I have no problem with that.

13 JUDGE FARRAR: But you wouldn't want to
14 see any particular note taken of it at the hearing to
15 give it some quasi-more exalted status.

16 MR. GAUKLER: No, Your Honor. I don't
17 think so. No.

18 JUDGE FARRAR: All right. Mr. Gaukler,
19 you also have made an eloquent and forceful statement
20 of the Company's position and responded well to our
21 questions. I'll give you an minute if you have
22 anything else to add, but then I'd like to turn and
23 ask the Staff what its view is.

24 MR. GAUKLER: I think I've addressed all
25 of the main points I wanted to make. I think I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 responded to the Board's questions. If I haven't, I
2 certainly --

3 JUDGE FARRAR: You'll probably get --

4 MR. GAUKLER: More I'm sure.

5 JUDGE FARRAR: Our usual custom. You'll
6 get another chance. Thank you very much, Mr. Gaukler.
7 Mr. Turk, you've heard the arguments. Is Mr. Gaukler
8 correct that the Staff has done no review or no
9 analysis of the State's issue three reports?

10 MR. TURK: He's partially correct. We
11 have not done our own analysis of what would be the
12 radiation doses consequences if a breach of the cask
13 occurred. We have however looked at what the State
14 presented and if we had to, we would be prepared to
15 rebutt them. But we don't think that it would be
16 appropriate to have to do that. I would like to lay
17 out my reasoning if I may.

18 JUDGE FARRAR: Yes, go ahead.

19 MR. TURK: (1) I have to recognize from
20 the outset that we are not on a secure telephone so I
21 can't go into any details about the methodologies or
22 the analyses or the results of the analyses. So I
23 will stay away from that. You have to read between
24 the lines when you listen to my comments to understand
25 the Staff's position on issue no. two as to whether or

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 not there is a breach of the cask.

2 We believe that there is no reason at this
3 point to get to issue no. three. We will be
4 publishing our report in approximately three weeks and
5 you'll be able to see the details of our analysis as
6 well as our evaluation of what PFS has done and what
7 our evaluation of what the State had presented. Based
8 on my conversations with the technical staff, I think
9 that the Staff report will be comprehensive and
10 persuasive.

11 I think we never have to reach the
12 question that the State wants to get to also as to
13 what are the radiation dose consequences of a breach
14 of a cask. In our mind, that's a hypothetical case
15 that is beyond the design basis that need not be
16 addressed.

17 JUDGE FARRAR: Okay. How do you square
18 that position with the absence of a footnote when the
19 Commission said wrap this case up. Get a complete
20 record. I didn't see a footnote other than on those
21 matters that the Applicant and Staff choose not to
22 litigate now.

23 MR. TURK: I don't have the Commission's
24 decision in front of me.

25 JUDGE FARRAR: You do concede it did not

1 have a footnote of that nature attached to it.

2 MR. TURK: That's correct. But it also
3 has a statement that Ms. Chancellor in which as I
4 understand the reading the Commission indicated that
5 the Applicant is free to make a case that the aircraft
6 crash will not penetrate the cask or even if it did,
7 it would not have significant radiation dose
8 consequences. There would be no significant radiation
9 consequences of that event.

10 The Commission did not require as I
11 understand Ms. Chancellor's reading of their decision
12 that PFS put on a full case that addresses both the
13 lack of structural consequence as well as a
14 hypothetical case where if one assumes a structural
15 consequence, what would be the dose consequence of
16 that?

17 JUDGE FARRAR: That sentence you just read
18 was not followed by a sentence that said "Of course,
19 the Applicant can do A or B or it can do A and wait
20 and see how it makes out and then it can do B later."
21 It didn't say that, did it?

22 MR. TURK: No, it did not instruct the
23 Applicant which way to proceed nor does the licensing
24 board. The important point to keep in mind is that
25 the issue before the Board is is the facility safe to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 license. The normal way in which the Commission
2 evaluates risk is to look first at the probability of
3 an event occurring and as Judge Lam noted that if the
4 probability is below a certain level so as to be
5 incredible, you never have to reach the question of
6 what are the dose consequences of some incredible
7 beyond design basis event.

8 So to take the State's approach would be
9 to disregard 30 years of Commission licensing
10 proceedings both before licensing boards as well as
11 Staff and Commission actions where there is no
12 contested proceeding where the only evaluation of
13 those consequences that have to forward is of credible
14 accidents. So unless the case can demonstrate that a
15 credible event involved with structural breach, there
16 would be no reason to reach the second question or in
17 this case the third question on what are the dose
18 consequences of that hypothesized event.

19 JUDGE FARRAR: That would ordinarily be
20 the case in Judge Lam's meteorite example. If you
21 can't show there's a high probability, we don't waste
22 our time on consequences. But this is an unusual case
23 that the Commission has noted has gone on a long time.
24 So why wouldn't this case be the exception to that 30
25 years of culture and history?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. TURK: The Commission has not said
2 that this case presents any reason to go outside of
3 the normal way of addressing safety questions. All
4 they said is the case has gone on for a long time.
5 Let's get it over with. That doesn't instruct anyone
6 how to make the case that has to be considered now.

7 But then let me address in terms of would
8 the State's approach help us to get the case over with
9 quickly or not. I disagree with the State. They say
10 that there would only be a one or a two or a three
11 week difference in schedules if we litigate those
12 consequences now. That's not correct.

13 The only thing that would only take two or
14 three weeks additional time would be rebutting the
15 State through cross examination and showing perhaps
16 through rebuttal witnesses why the State's analysis is
17 incorrect. That would not put you in position where
18 you have either a PFS or a Staff analysis showing what
19 would be the actual dose consequences of some
20 hypothetical breach of the cask.

21 Even the State's analysis - I don't know
22 if you'd have opportunity to read it yet - does not
23 link a breach of the cask with any particular dose
24 consequences. They hypothesize. They start with an
25 assumption of a hole size of some amount without

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 showing that hole size would result from an aircraft
2 crash. So even the case that they wish to make to you
3 is a hypothetical case that would not help you decide
4 whether this facility is safe to license or not. So
5 you would advance nothing by taking their case under
6 consideration and in fact to make a complete record
7 you could probably have to wait now for PFS and the
8 Staff to go back and do lengthy analyses of some
9 structural event that could breach a cask and look at
10 what would be the consequences of that particular
11 breach. But even that would be a hypothetical case.
12 It would have no value to you unless you find that
13 that breach would occur.

14 JUDGE FARRAR: You know Ms. Chancellor is
15 going to say when it's her turn next, Mr. Turk, "God
16 help the State if six months later they said 'Oh we
17 forgot to do something. Give us some extra time to do
18 our analyses so we can get ready for the hearing.'"
19 She's going to say that that right was never given to
20 her in this entire proceeding. So how would you
21 respond if she were to say that?

22 MR. TURK: I would say there's no
23 foreclosing of the State's opportunity later to make
24 out a case on radiation dose consequences if the Board
25 or the Commission find that a breach of the structure

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 happens.

2 JUDGE FARRAR: No, maybe I didn't make my
3 anticipation of what her argument would be clear. If
4 we decide that we're going to litigate issue two and
5 issue three now, you're telling me the Staff and the
6 Applicant will put up their hands and say "Oh, we have
7 to have some time now to do our preparation" and Ms.
8 Chancellor's going to say "The State was never given
9 any such opportunity at any phase of this proceeding
10 to say oh we forgot to do something. Let us go back
11 and do it again." What's my answer to her supposed to
12 be?

13 MR. TURK: Well, I'm trying to picture
14 that scenario and I have a hard time imagining that
15 that argument would come before you. If the Board
16 found that there were to be a structural breach, I
17 think all parties then would go --

18 JUDGE FARRAR: No, Mr. Turk. Let me say
19 it again. Please listen and answer what I'm asking
20 you. If we say today that we're going ahead with
21 issue two and issue three, I think you said to me that
22 there wouldn't be just a little delay in the hearing
23 time. The Staff and the Applicant would need time to
24 go prepare some reports. The instant you and Mr.
25 Gaukler say that Ms. Chancellor is going to put up her

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 hand and say "Wait a minute. Whenever the State fell
2 behind, whenever the State didn't do anything, they
3 didn't get to put up their hand and say 'Hey, give us
4 another chance. We forgot to do our reports or we
5 forgot to file a pleading. Give us some weeks or
6 months because we didn't do what we had an opportunity
7 to do.'" What would the response to that be?

8 MR. TURK: First, let me say you're right.
9 I did misunderstand your question. If the Board were
10 now to say we want to go forward with those
11 consequences, you would do that because the State is
12 pushing that decision. The State would be requesting
13 that you consider that issue.

14 PFS when it submitted its initial report
15 did not present that issue for your consideration.
16 The State is the one that raised it when they issued
17 their responsive report and they came back with a
18 report saying here would be dose consequences.
19 Neither PFS in its submittals to the Commission nor
20 the Staff until now have said that that's an issue
21 that requires your consideration. So if the State was
22 to make that argument, a fair response could be that
23 until now only the State thought this issue had to be
24 litigated. Only now that the Board has adopted the
25 State's suggestion, should other parties now be

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 required to address it. Merely because the State
2 addressed it on its own does not mean that other
3 parties are required to address it until the Board
4 says this is an issue that must be addressed.

5 JUDGE FARRAR: All right. Go ahead, Mr.
6 Turk.

7 MR. TURK: Thank you, Your Honor. I'm
8 sorry. Just one minute please.

9 JUDGE FARRAR: Go ahead. Mr. Turk, while
10 you're collecting your thoughts, give us a moment here
11 also. All let you know when we're back on. Off the
12 record.

13 (Whereupon, the foregoing matter went off
14 the record at 2:30 p.m. and went back on
15 the record at 2:31 p.m.)

16 JUDGE FARRAR: Okay, we're back on. Go
17 ahead, Mr. Turk.

18 MR. TURK: Thank you, Your Honor. I think
19 I've addressed all the points that I've wanted to. I
20 would sum up, however, to indicate our view that if
21 you do accept the state issue now, then you would, in
22 effect, be setting a new precedent in which beyond
23 design basis events would have to be considered for
24 their -- those conferences, and that would be contrary
25 in our mind, as to how the Commission licenses the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 facilities and it would be contrary to any other
2 proceedings in which they see issues are evaluated in
3 terms of whether they present a credible event or not.

4 JUDGE LAM: Mr. Turk --

5 MR. TURK: We, in this case, as far as the
6 Applicant can see, this is an issue that need not be
7 addressed and should not be addressed at this time.

8 JUDGE LAM: Mr. Turk, this is Judge Lam.
9 I'm so glad you raised that issue. Remember earlier
10 in this in phone conference, I specifically asked Ms.
11 Chancellor two questions. Are these events that they
12 are dealing with, radiation dose consequences,
13 criticality 4 within 10^{-6} range of probability of
14 occurrence and twice, her response has been positive,
15 yes, they are.

16 If indeed, the State of Utah is asserting
17 they are not beyond design basis accident, then may I
18 hear from you why we should not listen to what they
19 have to say?

20 MR. TURK: If she eventually succeeds in
21 that argument before you, before her presentation of
22 evidence, and you conclude that yes, this is a
23 credible event, then the issue of what are the dose
24 consequences of that event should be evaluated.

25 But in view of the fact that the other

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 parties disagree with her assertion and urge you to
2 find that in the event this -- in the event you find
3 this to be a credible accident, there is still time
4 then to look at the dose consequences. And it would
5 be wasteful to go ahead and assume that now without
6 having proof on the issue. Then I think it would be
7 inefficient and a waste of resources for us to have to
8 address that issue now.

9 JUDGE FARRAR: But it wouldn't run afoul
10 of what you said a couple of minutes ago. I'll
11 rephrase it. It would not afoul of what you said a
12 few minutes ago, that we would suddenly for the first
13 time be saying you have to look at the consequences of
14 design basis accidents. All we'd be saying is that we
15 choose to litigate at this time the consequences of
16 what might prove to be a design basis accident.

17 Obviously, you're correct that if it's not
18 a design basis accident, we don't worry about the
19 consequences. But we don't know that yet and the
20 accusation that we are suddenly departing from 30 or
21 50 years of precedent and considering consequences of
22 non-design basis accident is not really a fair
23 statement of where we are at this moment, is it?

24 MR. TURK: Oh, I think it is. Because any
25 Intervenor can always say that some accident they

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 hypothesized is a credible event and you should look
2 at the dose consequences of that event.

3 But unless you first find that it's a
4 credible event, there's no reason to take the second
5 step.

6 JUDGE FARRAR: And you think that by
7 saying okay, we're just going to Issue 2 now, and not
8 take up Issue 3, notwithstanding the language the
9 Commission used, they would think that was good case
10 management?

11 MR. TURK: I certainly do. And let me
12 make one other point which I made before, but perhaps
13 not clearly enough. Even the State's report, even the
14 evidence that they wish to present to you, does not
15 show you that the -- that an aircraft crash will have
16 any particular dose consequences.

17 The case they make out is totally
18 hypothetical. They start out assuming certain hole
19 sizes and saying what are the consequences if you had
20 a hole size of such degree. But they don't make the
21 link between the air crash crash event in any
22 particular hole size even if they're right in
23 theorizing that there would be a breach.

24 JUDGE FARRAR: So you're saying they're
25 just basing their analysis of Issue 3 up to this point

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 on the inventory of the rods as opposed to any
2 particular accident freeing up that inventory?

3 MR. TURK: In a nutshell, yes. So you
4 really won't have much of a record to base a decision,
5 if you take their evidence and even if you agree with
6 their evidence. You would still have to go back and
7 ask the parties, all right, what are the real
8 consequences of an aircraft crash assuming a breach of
9 a particular degree with a certain hole size that you
10 find to be credible.

11 JUDGE LAM: Now Mr. Turk, since the state
12 has done all of the work and assuming we adopt your
13 approach, will we hear what is the subject integrity
14 issue and the likelihood of occurrence first. Can
15 than -- if right in the middle of the hearing, let us
16 say two weeks into the hearing we are persuaded that
17 yes, indeed, these are likely events, using your
18 approach, we would not be able to hear further
19 evidentiary presentation? We have to wait.

20 MR. TURK: Are you asking whether you
21 could then proceed to hear the state's case?

22 JUDGE LAM: That's exactly right. Let us
23 say two weeks into the hearing, we are persuaded by
24 the state's presentation, aha, the bridge size is
25 commensurate with the probability of occurrence, that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 they assert.

2 Would your approach be not be right to
3 hear what the state had to say in terms of
4 consequences?

5 MR. TURK: If we follow that approach, the
6 parties would not be ready to either put on the
7 evidence or to address that evidence, if we proceed in
8 what I believe to be the logical manner now, Issue 3
9 now.

10 JUDGE LAM: My understanding is both the
11 Staff and the Applicants are not ready to address
12 Issue 3.

13 MR. TURK: That's correct. We're not
14 ready now. We would not be ready if we were called in
15 the middle of hearing.

16 JUDGE FARRAR: Mr. Turk, going way, way
17 back in the administrative record of this case, before
18 there was ever a hearing, I seem to recall the Staff
19 trying to get the Applicant to address issues 2 and 3,
20 2 and/or 3, a long, long time as part of the review of
21 the initial application and the Applicant declining to
22 do so.

23 One, is my recollection right? And two,
24 is the Staff's current position inconsistent with that
25 position?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. TURK: I don't think your recollection
2 is quite accurate. I believe what we did is we said
3 that in light of the Commission's decision that PFS
4 should now -- is now permitted to and should proceed
5 to litigate those consequences. I'm sorry, the
6 consequences of an aircraft crash should they choose
7 to do that, we didn't say that PFS should address the
8 consequences in any particular manner. We did not
9 preclude the idea that they might be able to take Step
10 2 before going to Step 3 and maybe avoiding having to
11 go to Step 3 all together.

12 JUDGE FARRAR: And that position is or is
13 not consistent with the position of many years ago
14 where administratively you asked them to deal with
15 consequences and they said ah, we don't need to?

16 MR. TURK: None of us in this room recall
17 that we ever asked them to look at those consequences
18 of an aircraft crash.

19 JUDGE FARRAR: I thought we made reference
20 to that in the part of our March 10th opinion
21 reviewing how the consequences issue had and had not
22 been framed over the years. That may have been wrong.

23 MR. TURK: My recollection is that there
24 was really a two-part process envisioned at that time.
25 One probability and two, consequences. But at the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 time when we looked at probability we were equating
2 the site impact probability which probability of
3 capped breach. PFS instead of following that Staff
4 assumption and perhaps that was a Board assumption,
5 has introduced Step 2. And that's not inconsistent
6 with our thinking before. We just hadn't expressly
7 laid out a process to follow.

8 JUDGE FARRAR: What do you think of our
9 suggestion that if we side with the Staff and the
10 Applicant on this issue that the state gets to put
11 forward in some fashion, not as evidence, not anything
12 we would make a ruling on, but put forward in some
13 fashion their position on consequences. It would get
14 some sort of recognition that that work had been done?

15 MR. TURK: Your Honor, I'd like to address
16 that later by looking at specific options that you
17 might have in that regard.

18 I certainly think it would be wrong to do
19 it as part of the evidentiary record.

20 Perhaps in a footnote of a decision that
21 you issue ultimately, you could take note of the fact
22 that the state was prepared to reach that issue, but
23 you also would have to recognize the nature of the
24 case that the state wanted to put before you, which as
25 I indicated is not a demonstration of the consequences

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 of any particular aircraft crash, but a hypothetical
2 breach.

3 JUDGE LAM: Now, Mr. Turk, what harm would
4 it do if the state put it as part of our evidentiary
5 record, the consequence and criticality analysis that
6 they have done? The facts stand as they are. If the
7 state is wrong, they're wrong. If they're right,
8 they're right. And can we accept it as evidence
9 saying both the Staff and Applicant reserve the right
10 to respond to this evidence when and if it's
11 appropriate for them to do so?

12 What harm would it do?

13 MR. TURK: Your Honor, there are a number
14 of flaws in what the state is presenting to you. What
15 you see addressed, if we had to respond to their
16 testimony or to their report on that issue, but even
17 if you assume that the state had a proper analysis,
18 you still would not have a record upon which you could
19 rely to say what would be the consequence of an
20 aircraft crash, because the other parties would not
21 put on evidence and you would not have you before any
22 evidence of the consequences of any particular
23 aircraft crash.

24 JUDGE FARRAR: But Judge Lam's question
25 was you would just say here it is, we're not ruling on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 it. We're not accepting or rejecting it because the
2 Applicant and Staff have reserved their right to
3 respond, if and when that ever becomes appropriate?

4 MR. TURK: Your Honor, that would have no
5 apparent benefit and it would seem to me to be
6 contrary to the principle that Judges should not try
7 to reach declaratory judgment.

8 The issue before you is what are the
9 consequences of an air crash at the site. PFS is
10 going forward and saying there is no breach. Until
11 you reach decision on whether or not there's a breach,
12 there's no reason to reach declaratory judgement of
13 what would be the consequences if hypothetically we
14 assume a breach and hypothetically we assume a certain
15 breach and type and size. I mean that's going off
16 into reaching unnecessary judgment.

17 MR. TURK: Well, you know -- my training,
18 at least, is contrary to judicial precedent.

19 JUDGE FARRAR: Maybe I'm not making myself
20 clear today, but the last word I ever would have used
21 is making any judgment. I think I specifically said
22 we would not be making any judgment.

23 I think we've beaten this one up enough.
24 We've got to get moving here.

25 Ms. Chancellor, I'll give you a couple of

1 minutes to respond to what you've heard from Mr.
2 Gaukler and Mr. Turk.

3 MS. CHANCELLOR: Of course, Your Honor,
4 every ones into the hearing thinking that they will
5 prevail on the evidence that they present and PFS and
6 the Staff seem to think that it's a foregone
7 conclusion that we won't have to get to consequences.

8 It appears that we have to under PFS's and
9 Staff view that we have to prove credible accidents
10 twice, first -- in the first hearing we had, we proved
11 credible accident. They want a second hearing so that
12 we have to prove credible accidents again and then and
13 only if we prevail on that issue do we get to
14 consequences.

15 Conversely, if we had not raised
16 criticality and consequences, now I am sure the
17 argument would be well, the state hasn't shown that
18 even if there is penetration that there are
19 consequences. Getting back to shifting sands of time
20 --

21 JUDGE FARRAR: Wait, wait, wait, Ms. --

22 MS. CHANCELLOR: -- original contention
23 and what was contained in the original contention.

24 JUDGE FARRAR: Ms. Chancellor --

25 MS. CHANCELLOR: -- I draw the Board's

1 attention to the April 30th second joint report where
2 PFS admits or it did at that time, PFS states that the
3 issue of consequences itself was not beyond the scope
4 of the contention, in response to the state's
5 assertion that it had to file a new contention.

6 I believe this is just a -- that this is
7 not an issue of whether the consequences are in or out
8 of the hearing.

9 JUDGE FARRAR: Ms. Chancellor -- wait a
10 minute, Ms. Chancellor, let me back you up a second to
11 what you had said previously.

12 You're suggesting that if you hadn't
13 brought these reports in and you went and you --

14 MS. CHANCELLOR: The issue that PFS and
15 the state that I'm now talking about --

16 JUDGE FARRAR: And if the company --
17 you're not suggesting the Staff and Applicant would
18 have argued that you are foreclosed and therefore lose
19 on the overall unified issue because you never showed
20 there were any radiological consequences?

21 MS. CHANCELLOR: You've got it exactly.
22 I mean the standard that the state has to meet shifts,
23 depending on what the Staff and PFS's position is. It
24 seems that like whatever it is we get the worst end of
25 the stick.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 With respect to the issue of what the
2 Staff was expecting of the Applicant, and the
3 arguments of the motion in limine, you were asking,
4 Ms. Markle about what would happen if there was a
5 credible accident. If the probability exceeds the
6 threshold, then either the consequences would have to
7 be determined to see if there was no regulatory limit
8 or, on the other hand, if not, the Applicant would be
9 required to have in its facility to be able to
10 withstand the event.

11 So in other words, the consequence, Ms.
12 Markle admitted that the consequences would have to be
13 determined to see if they exceed the regulatory limit.
14 We are talking about consequences and your offer of
15 putting on the state's testimony with respect to its
16 radiation case, with all due respect, I think that
17 just elevates form over substance. What it does is it
18 finds us for a year. The Board doesn't make any
19 finding.

20 It may be -- it just doesn't -- I don't
21 think that is a starter, Your Honor, because if we're
22 going to put on our case, we want a ruling on that
23 case and we don't want any sort of feel-good
24 presentation or advisory opinion that the state put
25 this case on and just leave it at that.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 With respect to there not being a complete
2 record, another false dilemma, PFS and Staff have
3 chosen to rest on their laurels that the way they
4 intend to present the risk aspect of the case is to
5 show that there are zero consequences.

6 The Commission, when it issued its CL-03-
7 05 decision, it relied on both PFS and the Staff
8 saying that they were prepared to go forward on the
9 proceedings on consequences, citing the March 31 joint
10 report that the parties submitted to the Board.

11 And if you closely read the Commission's
12 decision, it is expecting the -- it says that the
13 Board has not completed its risk inquiry. It didn't
14 say the Board has not completed Phase 2 of the risk
15 inquiry and there will be a third phase. It just said
16 that the Board is still considering the consequences
17 aspect of risk.

18 The idea that this throwing up 30 years of
19 NRC practice is not the case. The state has put PFS
20 and Staff on notice that this is how we are going to
21 pursue our contention, the issue that is still
22 remaining.

23 PFS and the Staff, let's see, for six
24 months, nine months, knew what the state's position
25 was and if they choose just to rest on the assumption

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that there will be zero consequences that should not
2 preclude us from putting on our case, that if there is
3 a credible accident, then there will be consequences.

4 We're not asking for the Board to consider
5 incredible events. We're asking the Board to consider
6 credible events and we take the next step that there
7 are consequences.

8 Does anyone have anything else?

9 (Pause.)

10 Just a second, Your Honor.

11 JUDGE FARRAR: All right.

12 MS. CHANCELLOR: The only other thing I
13 would add that again in that joint report of March,
14 PFS noted that PFS's position is that it's permissible
15 for the Staff to present its position on a particular
16 issue for the first time in testimony in the
17 adjudicatory licensing proceeding, that was when the
18 state was insisting that PFS amend its license and the
19 Staff review it before we submit a contention.

20 So I think that it's sort of situational
21 -- I don't want to say ethics, but the standard shifts
22 and the state feels like it always comes up with the
23 short end of the stick. For example, the Commission
24 changed long-standing NRC practice where all the
25 residual issues of the state could appeal at the end

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 of the proceeding. They issued an order recently that
2 said well, we want you to file this within three
3 weeks.

4 So I think there is that even if you do
5 find that this violates long-standing practice, which
6 I don't think is the case, then I think given the
7 Commission's desire to get a complete record before it
8 as soon as possible, once extending the hearing for a
9 couple of extra weeks.

10 JUDGE FARRAR: Ms. Chancellor, thank you
11 again very much.

12 Mr. Gaukler, Mr. Turk, Ms. Chancellor, do
13 you want me and Judge Lam to decide this now or do you
14 want us to refer it to the Commission?

15 MR. GAUKLER: I was just going to make two
16 or three points if Your Honor will allow me.

17 JUDGE FARRAR: Answer my question, first.

18 MR. GAUKLER: I think we want you to
19 decide it now, Your Honor.

20 JUDGE FARRAR: Mr. Turk?

21 MR. TURK: We think it's appropriate to
22 decide it now, Your Honor.

23 JUDGE FARRAR: Ms. Chancellor?

24 MR. TURK: But I would not oppose, if you
25 wanted to confer with Judge Abramson, when he's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 available, and give us a decision in a day or two.

2 JUDGE FARRAR: Well, the problem with that
3 is we have you on the phone now and want to get --
4 well, let me ask you this. How much discovery were
5 you all planning on doing between now and April 20th?
6 In other words, is this a dead period or are you able
7 to use this time?

8 MR. TURK: We're not going to be doing any
9 discovery between now and April 20th.

10 MR. GAUKLER: We have discovery starting
11 under both schedules, depositions on May 3rd, based
12 upon the Staff's issuance, for April 20th to allow
13 parties 10 days.

14 JUDGE FARRAR: But there was once a
15 suggestion, Mr. Gaukler that you all might get some
16 discovery done a head of time.

17 MR. GAUKLER: That did not work out, Your
18 Honor.

19 JUDGE FARRAR: Okay. Ms. Chancellor, do
20 we decide it or send it to the Commission?

21 MS. CHANCELLOR: We'd like you to decide
22 it, Your Honor. (pause) I might add, in our favor.

23 (Laughter.)

24 MR. TURK: Your Honor, this is Sherwin
25 Turk. The fact that you mentioned that you might want

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 to send it to the Commission would seem to indicate to
2 me that you believe it's a significant decision on
3 your part and if that I would ask you to include Judge
4 Abramson in your decision so that anything of the
5 moment would be considered by all three Board Members.

6 JUDGE FARRAR: I didn't necessarily
7 suggest that I thought it was worthy of going to the
8 Commission, I just wanted to see what you all thought
9 about it. The fact that I asked the question doesn't
10 mean that I'm doing anything other than finding out
11 your views rather than expressing mine. But thank you
12 for the thought.

13 Let's take a moment break here. Can
14 anyone hear me?

15 (Off the record.)

16 JUDGE FARRAR: All right, we're back on
17 the record.

18 Ms. Chancellor, are you there?

19 MS. CHANCELLOR: Yes, Your Honor.

20 JUDGE FARRAR: Mr. Turk?

21 MR. TURK: Yes, Your Honor.

22 JUDGE FARRAR: Mr. Gaukler?

23 MR. GAUKLER: Yes, I'm here.

24 JUDGE FARRAR: All right, Judge Lam and I
25 are in agreement that both sides have made cogent and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 persuasive cases. Although we had hoped to get a
2 final schedule established today, the fact that the
3 Staff report is not coming out until April 20th, the
4 time in between now and then is essentially dead,
5 allows us to take up someone's suggestion that we wait
6 and confer with Judge Abramson because this is a key
7 matter that we want to make sure we get right and
8 think about. It does determine the course of the
9 proceeding. So we will take that option. I think
10 he's traveling all this week, but what we'll do by the
11 time he gets back, we will have a transcript. He can
12 look at it and we will confer and convene, let's set
13 now a conference call for next Wednesday, the 7th of
14 April. Hold on a second.

15 (Pause.)

16 Let me retract that. Let's do it on
17 Thursday, the 8th at 1:30. And let me ask you, we
18 will tell you our decision at that point and we'll
19 move forward. Let me ask you to be ready at that time
20 to tell us how you propose we categorize the major
21 issues. There are two, three or four of them that we
22 might divide the trial into, who are the witnesses on
23 each issue and be ready to talk seriously about a plan
24 for allocating to each party either by major issue or
25 over the entire proceeding how much cross examination

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 time each party will be able to use in its discretion.
2 It could be divided equally among all witnesses anyway
3 they saw fit and how you would balance the time
4 between the fact that one side will have one party on
5 that side and the other side will have two parties on
6 that side and how you equalize that.

7 In discussing this with Judge Abramson,
8 oh, let me say one other thing, as we do the schedule
9 at that time, the Board Members have serious conflicts
10 the last week of August and the first of September, so
11 we were hoping, for example, we were going to suggest
12 a four-week hearing time between July 26th and August
13 20th, depending on how this issue had gone or I
14 suppose you could bifurcate the hearing and have four
15 weeks of hearing before a two-week break and two weeks
16 after, but I just wanted you to be aware, as you are
17 doing your thinking amongst yourselves of the Board's
18 various conflicts the last week of August and the
19 first week of September.

20 No matter how our decision comes out after
21 consulting with Judge Abramson, we want to express our
22 concern over the appearance that was mentioned that
23 when the state is not ready to proceed or didn't meet
24 some time requirement during the course of this
25 proceeding, the proceeding went on and they suffered

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the consequences.

2 It may well be that all we have here is an
3 appearance and there may be ample justification of why
4 the Staff and the Applicant believe they had the right
5 to elect not to meet the state's arguments on
6 consequences, but there is at least -- we want to make
7 sure that there's only at most the appearance and not
8 the actuality of disparate treatment when one side is
9 not ready to go, they suffer the consequences. When
10 the other side is not ready to go, they say well,
11 we'll need more time and those of you who know how the
12 Board proceeds know that that is not something we want
13 to ever be associated with. We're troubled by the
14 appearance and we will wrestle ourselves with the
15 question of whether that's just an appearance that is
16 not borne out by the facts or whether that would be a
17 reality. And by the time we have a decision for you,
18 we will address that.

19 So there will be no decision today other
20 than that we will meet with Judge Abramson and have a
21 decision for you on Thursday, April 8th in a 1:30
22 conference call. We will send you the information to
23 participate in that call.

24 Any comments, Mr. Gaukler?

25 MR. GAUKLER: No comments, Your Honor, I'm

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 sorry. I had the mute button on. I didn't realize
2 that.

3 JUDGE FARRAR: That's all right. I was
4 afraid that we had lost you.

5 Mr. Turk?

6 MR. TURK: No, Your Honor.

7 JUDGE FARRAR: Ms. Chancellor?

8 MS. CHANCELLOR: Not on what you said,
9 Your Honor, but I do have one potential issue that I
10 wish to raise again.

11 JUDGE FARRAR: Go ahead.

12 MS. CHANCELLOR: Shall I do it now?

13 JUDGE FARRAR: Yes, go ahead, Ms.
14 Chancellor.

15 MS. CHANCELLOR: Referring to a January 2
16 letter to the Director of the Office of Nuclear
17 Security and Incident Response asking them for a
18 portion marked copy of the Utah Expert Reports and
19 asking them to lift the safeguards designation from at
20 least the Thorne and Thompson reports, we have not
21 heard a word from Mr. Zimmerman or anybody else at the
22 NRC on this issue and I know the Board has been
23 diligent in instructing the Staff to look into this
24 issue, but we are just getting no due process at all.
25 I mean there's no avenue that we can appeal this

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 further. I guess we can go likely to the Commission
2 and just plead our case there, but it's very
3 frustrating, Your Honor, especially when we're going
4 to be back in D.C. and trying to deal with safeguards
5 documents in a hotel and it's just going to be very
6 unmanageable.

7 JUDGE FARRAR: Ms. Chancellor, I never
8 have any dealings with the Commission, but from what
9 I know of them I'm sure they would not want to be
10 bothered with you having to go up there and annoy them
11 about this.

12 Mr. Turk, what are you going to do about
13 this?

14 MR. TURK: Your Honor, several weeks ago
15 I saw a draft of a letter prepared by Mr. Zimmerman to
16 go back to Ms. Chancellor. It had in it the outcome
17 that I thought was likely and almost inevitable. I
18 don't know what happened. I don't know if the letter
19 was sent out and she hasn't received or if it's been
20 held up for some reason.

21 JUDGE FARRAR: I think you said at the
22 beginning that Mr. Zimmerman was there with you.
23 Whether or not he's still there, could you ask him to
24 make it a top priority. This is unfair that one party
25 -- I know the Staff gets to rule on safeguards. We've

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 recognized their authority and the lack of our
2 authority, but we're in the midst of litigation and
3 it's not fair for one party to be holding up another
4 party's ability to do its business.

5 If the material has to be safeguarded, so
6 be it, but these people are entitled to an answer and
7 can your people sitting in the room with you, this is
8 Tuesday, can they assure me that by Thursday an answer
9 will be on its way?

10 MR. TURK: I can assure you personally,
11 Your Honor, that immediately after this conference
12 call ends I will talk to Mr. Zimmerman or whoever is
13 in his office and we'll find out what happened to the
14 letter and I will respond to the state with that
15 information.

16 JUDGE FARRAR: All right.

17 MR. TURK: Let me clarify something, if I
18 can?

19 JUDGE FARRAR: Yes.

20 MR. TURK: Mr. Zimmerman was not in this
21 room today. The people in the room was Ms. Zaccari,
22 Mr. Waters, Mr. Guttman and Mr. Shewmaker.

23 JUDGE FARRAR: I'm sorry. I thought you
24 had said Mr. Zimmerman.

25 MR. TURK: No.

1 JUDGE FARRAR: And let's do this --

2 MR. TURK: May I also address the other
3 point, Your Honor? The state has not been held up.
4 I had given the state a response by telephone in which
5 I told her we do not do portion markings of people's
6 reports so she knows that answer.

7 If all she's waiting for is a formal
8 letter back, she already had the informal and when the
9 letter comes back to her, she'll see it in writing,
10 but she has not been held up. She knew the answer for
11 several months already.

12 JUDGE FARRAR: Let me ask you this, Mr.
13 Turk, when you say "we don't do portion markings" that
14 may be a rule the Staff generally follows. Is that an
15 appropriate rule to follow in litigation?

16 MR. TURK: I see no reason to set that
17 practice aside. The only issue that the state is
18 raising is the difficulty of being able to communicate
19 with their witnesses. I think if they would speak to
20 us about guidance on the kinds of things that need to
21 be or do not need to be treated as SGI, we would talk
22 to them about that. But they've ask for a document to
23 be portion marked and I've told her that the Staff
24 does not do that.

25 JUDGE FARRAR: When I asked some months

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 ago to see how we were going to run this hearing, I
2 asked for the principles the Staff was following in
3 calling something safeguards or not. I gave it up as
4 a bad effort because I didn't get any answer. And
5 that's no criticism of the gentleman whose name
6 escapes me whose work I've come to respect or whose
7 approach I've come to expect, but he was unable to
8 give me an answer that here's the guidelines we follow
9 and so we said okay, great, the whole hearing is
10 safeguards.

11 MR. TURK: What I believe I said to Ms.
12 Chancellor in the past is that the methodologies and
13 the results of vulnerability studies are not to be
14 disclosed, that they are treated as safeguards
15 information. That's the guidance that I've given her.
16 I don't know what more I need to do in that respect.
17 I've spoken with her informally and she keeps raising
18 the issue before you, which I believe is unfair.

19 JUDGE FARRAR: How about this? Why don't
20 we get her, as I suggested, get her a letter that
21 states the Staff position. Then she'll either like it
22 or not like it, but at least she'll have something in
23 front of her that's not conversation and that she can
24 -- it will be a clear message that she may like or not
25 like, but then she'll be able to know where she

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 stands.

2 MR. TURK: I will speak to Mr. Zimmerman's
3 office as soon as we break from the conference call,
4 Your Honor.

5 MS. CHANCELLOR: Just a point of
6 clarification, Your Honor. I don't recall Mr. Turk
7 mentioning that they don't portion mark these reports.
8 I was going on the assumption based on Mr. Stapleton's
9 conversation with us in a conference call quite some
10 time ago that Mr. Stapleton said that they do portion
11 mark all documents and that was the basis on which I
12 asked for a portion marked copy.

13 It's not just communicating with our
14 experts. My understanding from talking to Mr. Gaukler
15 is that it's very difficult to acquire a safe for
16 safeguarding documents in hotel rooms and if we have
17 a number of lawyers and a number of experts, and we're
18 all going to put our documents in a safe for
19 safeguarding documents, I just don't know if that's
20 going to be manageable.

21 I do agree that Mr. Turk has been willing
22 to work with us in terms of how we go about preparing
23 for the hearing and how we safeguard documents, but I
24 just don't recall having any conversations with Mr.
25 Turk prior to -- other than conversations I had prior

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 to sending the January 2 letter. I just wanted to
2 make that clear.

3 JUDGE FARRAR: All right, if you all were
4 able to resolve Contention TT in the very elegant and
5 useful and appropriate way that you were able to, you
6 ought to be able to resolve this and Mr. Turk since
7 the Staff has the lead role in safeguards, we will
8 count on you to do that. And you've said a couple of
9 times you will speak to Mr. Zimmerman. Please inform
10 the Board by Thursday if Mr. Zimmerman chooses not to
11 respond to your request. We want to know that.

12 MR. TURK: I will get back to the Board
13 and Ms. Chancellor.

14 JUDGE FARRAR: Thank you. Anything else
15 that we need to deal with? I'm sorry we entered this
16 conference fairly excitedly thinking we were going to
17 set a hearing date, but I think we will be better off
18 to involve Judge Abramson and there will be no delay
19 occasioned by waiting because we're awaiting the Staff
20 report on April 20th.

21 Mr. Turk, we've kind of taken that as a
22 given. Do I take it from the absence of any comment
23 that, in fact, the Staff report is still targeted for
24 April 20th?

25 MR. TURK: Yes, we're still on target.

1 JUDGE FARRAR: All right. Is anything
2 going to come out -- there was a possibility that
3 something would come out earlier?

4 MR. TURK: We were hoping to get out the
5 aircraft angles and speeds portion before then. I
6 don't have a date for that, but I will continue to
7 work with Dr. Kampe and Dr. Goshe to see if we can get
8 that out sooner. It won't be significantly sooner
9 than the April 20th date, but if we can get that out
10 ahead of time, we will.

11 JUDGE FARRAR: All right.

12 MS. CHANCELLOR: Your Honor, I just have
13 one question. Did you want us to try to come up with
14 categorizing these major issues and sending you
15 anything?

16 JUDGE FARRAR: No, just be ready -- yes,
17 talk to each other and just be ready to let us know
18 orally in that conversation, but you know the thing
19 I'm talking about like on seismic, you had like six.
20 You had soils and you had this and that. Just that
21 same thing, so that would give us a way to organize
22 the hearing, organize how we're going to approach our
23 opinion and organize how we would decide how much
24 cross examination in toto might be appropriate for a
25 particular issue as opposed to a particular -- as

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 opposed to the overall hearing. It just let's us
2 subdivide some of our management ideas. And we have
3 talked among ourselves, I want to repeat this. We are
4 close to coming to the conclusion that the best way to
5 manage cross examination is to let you do the micro
6 managing of it rather than us tell you when cross
7 examination is being inefficient, you are the ones who
8 understand your cases the best.

9 You are the ones who can say which
10 witnesses you really need to spend a lot of time with
11 and which you don't and so it seems that we can macro
12 manage it and let you micro manage it and that would
13 be the most suitable way to make sure the cross
14 examination is under control and that whatever length
15 of time we set for the hearing, we always know that
16 we're on target to meet it.

17 So if you all can begin to talk about
18 that, we can -- we may not have to finalize that
19 aspect next Thursday's call, but we can have a good
20 discussion of it.

21 Any other thoughts we need to consider?

22 MR. GAUKLER: We just had one question,
23 Judge Farrar.

24 JUDGE FARRAR: Yes, Mr. Gaukler.

25 MR. GAUKLER: Are you going to announce

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 your decision on the issues to be included in the
2 hearing next Thursday or is that something you're
3 going to do beforehand?

4 JUDGE FARRAR: It will be next Thursday
5 because I'm not sure with the travel schedules we can
6 get together significantly before then. And we have
7 to wait for Judge Abramson to have a chance to read
8 the transcript and if we can do it before then, we
9 will, but we pick that date because of the different
10 things we're all doing and I think that's the first
11 time we'll be sure we are all together.

12 MR. GAUKLER: Okay.

13 JUDGE FARRAR: Any other questions?

14 MS. CHANCELLOR: Sorry to be a nuisance,
15 Your Honor, the dates on which the Board has a
16 conflict is August 23 through September 3, is that
17 right?

18 JUDGE FARRAR: Right. August, no August
19 23 -- yes, August 23 through September 3 and Labor Day
20 is the 6th.

21 MS. CHANCELLOR: Okay, got it. Thank you.

22 JUDGE FARRAR: The conflicts are not for
23 the whole two weeks, but there are things in there
24 that we couldn't go full weeks, so if we had to break
25 that might be -- if, in fact, we let these other

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 issues in and we're able to move forward on the
2 hearing or longer than four weeks or had to be
3 deferred, maybe you do two weeks before then and two
4 weeks after, but let's not worry too much about that
5 until we come up with our decision on these issues the
6 state wants to present.

7 All right? Again, it is certainly a
8 delight to preside over a proceeding like this with
9 lawyers who are so good in not only presenting their
10 arguments, but responding to the Board's questions and
11 responding to the other side's arguments and today
12 you've all three been very eloquent and very powerful
13 in representing your particular clients' positions and
14 for that we thank you.

15 If there's nothing else, we will recess at
16 this point. I'll talk to you in a few days.

17 Thank you.

18 (Whereupon, at 3:21 p.m. the
19 teleconference was concluded.)
20
21
22
23
24
25

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

CERTIFICATE

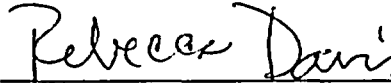
This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Private Fuel Storage, LLC

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.



Rebecca Davis
Official Reporter
Neal R. Gross & Co., Inc.