

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

Michael C. Farrar, Chairman
Dr. Peter S. Lam
Dr. Paul B. Abramson

In the Matter of

PRIVATE FUEL STORAGE, LLC

(Independent Spent Fuel Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

April 15, 2004

MEMORANDUM CONCERNING SCHEDULING

This Board recently held two prehearing conference calls in an effort to set a schedule for the remaining prehearing, hearing and post-hearing phases of this proceeding. The proceeding is now focused on determining the consequences of an accidental military jet crash into the proposed spent-fuel storage facility that the Applicant, Private Fuel Storage, seeks to build on an Indian Reservation in Utah's West Desert. That so-called "consequences" question must be addressed because we previously held that the probability of such a crash, although small, is sufficiently large that, under Commission standards, the crash must be considered in the licensing process. LBP-03-04, 57 NRC 69 (March 10, 2003).

Before the first call, we anticipated that the consequences hearing could be held in the July/August time frame. The purpose of this Memorandum is to note, in abbreviated fashion, that developments during the two calls -- while leading to a "consequences" hearing of reduced scope -- now point to a hearing no earlier than an August/September time frame. We expect at an upcoming third conference call on Monday, April 19, at 1:30 PM EDT (11:30 AM MDT), to set with some confidence the long-awaited schedule for the remainder of the proceeding, leading first to a hearing on the probability that a crash into the site would rupture a cask and then to our decision on that matter.

1. The first call was held on Tuesday, March 30, and was preceded by the parties providing us with alternate schedules for the balance of the proceeding. The schedules advocated by the Applicant PFS and the NRC Staff, on the one hand, and the Intervenor State of Utah on the other, had an overall three-week difference, which related solely to the two sides' differing views as to the appropriate scope of the proceeding.

In that regard, and given the colloquial past references to this aircraft crash risk contention as involving only two parts ("probability" and "consequences"), the scope matter that was presented by the two competing schedules can perhaps best be understood by explaining that the risk calculus here can also be described as having three parts: the probability of a crash into the site (already decided); the probability that such a crash will rupture a cask; and the dose consequences of the resulting radiological release.¹ The Applicant and Staff, believing that the overall probability of a release would prove so low as to be not credible (with the result that there would be no need to evaluate its consequences), thought it appropriate not to consider radiological consequences now and thus to focus the hearing only on the issue of the probability of a cask rupture; the State, believing that such a breach will prove to be credible and having filed a report some months ago on radiological consequences, thought the hearing should address that latter issue as well.

Anticipating that the scope matter might be readily resolved, we had set out at the beginning of the first call several other matters that we planned to discuss and resolve during that call (Tr. at 14585-86). As it turned out, those subjects were all deferred until the second

¹ See in this regard fn. 110 of our earlier decision on the site crash probability issue (57 NRC at 136), where we observed that "the categorization of the issue regarding cask penetration is a gray area that depends on how the 'accident' is defined. Thus, cask penetration was spoken of on a few occasions as constituting part of the 'accident probability' question (when the accident is defined as cask breach by a crashing aircraft), and on other occasions as part of the 'dose consequences' evaluation (when the accident is defined, as it most often has been here, as cask impact by such an aircraft)."

call (see ¶ 2, below). This action was taken because (1) the lengthy, eloquent arguments on the scope matter made it clear that the issue was so crucial and difficult that it did not lend itself to decision at that juncture; and (2) in view of Judge Abramson's unavailability to participate in the first call, the other Board members believed it important to consult with him -- as there was time to do -- before making a decision that would so significantly affect the proceeding's course (Tr. at 14637-43).

2. At the outset of the second call, held on Thursday, April 8, we announced the decision reached by the three of us to limit the scope of the present hearing, as the Applicant and Staff had urged, by not taking up the radiological consequences issue (Tr. at 14659). By way of explanation, we indicated that our ruling to take up only the issue of the probability that a crash would have cask-breach consequences was based solely on our pragmatic belief that doing so had the most reasonable likelihood of shortening the overall hearing process (Tr. at 14659-61).²

² As appeared during the calls, deciding on an efficient approach may involve journeys into the difficult territory of conjecture as to likely hearing outcomes. If the conjecture proves wrong, a course that promised to be efficient can become inefficient, and vice versa (see, e.g., Tr. at 14603-04). (For example, a determination to hear only the breach probability issue would prove efficient if the Applicant won, for the case would then be over, but inefficient if the State won, because we would then have to re-start on the dose consequences issue, rather than simply fold it that matter into the hearing now. Similarly, a determination to hear both issues now would prove efficient if the State won on the breach probability issue and thus the dose consequences issue became determinative, but inefficient if the Applicant won on probability, for then consequences would not have needed to have been heard.) Given the various possibilities before us, what became determinative was the possibility that if we heard only the cask breach probability issue and the State prevailed, the Applicant might then elect not to seek to proceed on the radiological consequences issue in favor of pursuing other courses, i.e., appealing our two decisions to the Commission and/or redesigning the casks (see Tr. at 14660-61). With it thus possible that there would be no call for a hearing on dose consequences regardless of the outcome of the cask breach issue, efficiency called for us to put dose consequences aside, at least for now.

In making that ruling, we also indicated that we have some question whether, in all the circumstances,³ the Applicant or the Staff, not having asked us previously to defer the dose consequences issue, had foregone any right to seek to litigate that issue later if their proof on the cask breach issue failed to carry the day (Tr. at 14661-63; see also Tr. at 14605). The key question in that regard -- whether the same procedural standards regarding readiness and timeliness that had been applied to the State throughout the proceeding would, if applied to the Applicant and the Staff, bar such a further presentation -- might never have to be reached, however, and thus we set it aside until another, distant day that may never arrive (Tr. at 14663). We did indicate, however, that because the State did desire to proceed, we would -- when we formally reject its material on this point at the start of the next hearing -- allow it to make an offer of proof, pursuant to 10 C.F.R. § 2.743(e) (Tr. at 14665).

Our scope ruling, we thought, paved the way to set the schedule, the purpose for which the two calls had been convened (Tr. at 14664). At that point, however, the Staff informed us (as it had told the other parties just prior to the call) that its analysis of the Applicant's proposal, long targeted for an April 20 release, would now not be available until May 11 (Tr. at 14665-66). This meant that there would be a three-week delay in the event that was to trigger the schedule (Tr. at 14667-68).⁴

The Applicant's counsel expressed the understandable need to consult with his client prior to committing to any particular new schedule (Tr. at 14669-70). The Board and the parties nonetheless went on to discuss several general concepts that would in any event be critical to

³ Those circumstances included the other parties' response, or lack thereof, to the State's having some months ago served notice, by filing a report on the subject, that its challenge to the Applicant's proposal embraced the dose consequences issue.

⁴ In this regard, the State announced that it was revising its earlier analysis to account for the changes in cask design which were the subject of Contention Utah TT. With respect to the State providing a report on that revised analysis to the parties and the Board, after some discussion May 11 was agreed upon as the delivery date (Tr. at 14713-28).

the eventual setting of a schedule. These included (1) the manner in which the entire case might be organized, for management purposes, into several categories (Tr. at 14671-80, 14688-91); (2) the number of witnesses or witness panels the respective parties might have on each such category, which number affects the length of time to be allotted to the taking of depositions and to the conduct of the hearing (and the scheduling of its various segments) (14671-82); and (3) the use of overall cross-examination time allotments to allow the parties themselves -- within the confines of the Board's overall management of the proceeding's general focus, content and length -- to manage strategically the length of their various particular presentations (Tr. at 14683-703).⁵

The discussions on all three of these topics were particularly worthwhile and gave the parties guidance for moving forward and for holding scheduling discussions among themselves, which they were charged to do (Tr. at 14712-13, 14728-31). Those inter-party discussions will lead to their suggesting an agreed-upon schedule (or alternative versions of a schedule), to be submitted for likely adoption at the next conference call (Tr. at 14731-34), set to take place on Monday, April 19 (Tr. at 14732).

In conclusion, we note once again our intention, once a final schedule is settled upon, to provide the Commission an overall report on why its initial expectations for a year-end 2003 decision were not met (see CLI-03-05, 57 NRC 279, 284-85 (May 28, 2003)) and why a year's

⁵ In this regard, this early discussion made it clear that the cross-examination time-allotment concept, though useful, would require some attention to make it workable in practice. The parties agreed to begin discussing it among themselves in light of the broad outlines the Board established or suggested.

unavoidable and uncontrollable delay has been accumulating.⁶ Although we have reported in separate orders or memoranda the causes of each stage of that delay, an overview of what has been encountered should prove valuable to the Commission in providing future direction as to the management of complex proceedings.

So NOTED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 15, 2004

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

⁶ Essentially, that delay has been attributable to an iterative Applicant-Staff process, involving Applicant submissions, Staff questions, Applicant responses, and Staff analysis. As we have indicated on several occasions, that delay -- incurred as part of the process of fulfilling the NRC's safety responsibilities -- has been beyond the Licensing Board's control.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM CONCERNING SCHEDULING have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of April 2004