

RAS 8143

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 07/14/04

SERVED 07/14/04

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

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

In the Matter of
PRIVATE FUEL STORAGE, LLC
(Independent Spent Fuel Storage Installation)

Docket No. 72-22-ISFSI
ASLBP No.97-732-02-ISFSI
July 14, 2004

MEMORANDUM AND ORDER

(Summarizing June 15 and July 1 Prehearing Conference Calls)

In the past month, on June 15 and July 1, the Board conducted two more in the series of prehearing conference calls it has been holding with the parties in preparation for the aircraft crash “consequences” hearing scheduled to begin on Monday, August 9. During the calls, a variety of matters were discussed concerning the upcoming hearing, including setting another prehearing conference call for July 15 at 11:30 A.M. EDT (9:30 A.M. MDT), all as briefly summarized herein.

1. Safeguards Matters. The Board began the first call by asking if there were any issues on which the parties needed guidance concerning the security measures necessary for protecting Safeguards information. Tr. 6/15 at 14909. With respect to the “war rooms” the State of Utah and the Applicant PFS wished to set up off-site for the duration of the hearing, the two matters discussed were: (1) whether a building that has controlled card access in the evening, but is protected only by a receptionist on the various floors during the day, would meet the NRC’s security requirements; and (2) the need for, and availability of, safes for storing

documents. Regarding the former, Cindy Harbaugh, from NRC physical security, expressed her belief that this would meet the NRC security requirements, but she would need both more details and to confer with her management. Id. at 14911-12. Regarding the latter, Ms. Harbaugh discussed the possibility of the outside parties using NRC safes for storing the safeguards information. Id. at 14961-69. Those parties were amenable to this suggestion, and agreed to discuss further with NRC security the use of both the “war rooms” and the safes.

At the second conference call, Ms. Harbaugh returned to discuss the developments in providing NRC-owned safes for the parties’ use during the hearing. She notified the two outside parties that a safe would be made available for each of them from a week before the hearing, around August 2, until mid-September (Tr. 7/1 at 15000-05) and that she was preparing the release form. All agreed that any further discussions as to logistics on these matters need not involve the Board but could be held directly with Ms. Harbaugh. Tr. 6/15 at 14913; Tr. 7/1 at 15005.

2. Hearing Openness. At the first conference call, the Board discussed with the parties whether the portion of the hearing on the “speeds and angles” subissue (involving non-Safeguards historical evidence) should be open to the public or closed. Tr. 6/15 at 14913-15. After weighing (1) the complications that might arise from having an open hearing on non-Safeguards matters that later became intertwined with Safeguards ones, *against* (2) the limited benefit to the public from having only a small portion of the hearing open, the Board reached the tentative conclusion that the entire hearing should be closed. Id. at 14918-19. The Board left open the possibility of revisiting this issue later if circumstances changed [e.g., after receipt of the pre-filed testimony and exhibits].

3. Witnesses. The next area the Board addressed during the first conference call was the number and order of witnesses. The Board expressed skepticism that nine sets of

witnesses could be completed in three days. Tr. 6/15 at 14923, 14927, 14930-31, 14970.

Nonetheless, the Board preliminarily accepted the schedule after reminding the parties that to accomplish that goal they would have to average only about two hours per set of witnesses. Id. at 14944.

The Board also expressed some concern over the fact that the Staff's witness and the Applicant's witness on the "jet fuel fires" subissue will not be addressing the issue in sequence. Id. at 14944-45. The Applicant stated that its witness was testifying the first week because he was unavailable the second week, but it would check with him to see if his schedule has changed. Id. at 14945. The State further explained that the subject matter will not take very long to hear, and that would make the entire second week available predominantly to the NRC Staff and to the State. Id. at 14946. Based on these representations, the Board decided the order of witnesses could remain as proposed by the parties. Ibid. The parties also stated that they would check on whether their witnesses would be available if the hearing extended briefly into the last week of August and, as a post-Labor Day fallback, from Tuesday, September 7, to Friday, September 10. Tr. 6/15 at 14969-70, 14994-95.

At the second conference call, the Board discussed at greater length the availability of witnesses, especially in terms of the hearing's duration. The State discussed the possibility of hearing the testimony on the "casks" subissue at the beginning of the hearing due to witness availability, but that raised possible problems with other witnesses on the "probability" subissue part of the hearing. Tr. 7/1 at 15063-65. After some discussion, in which many witness availability problems were raised, the Board reaffirmed its intention to have the hearing end by no later than mid-September, but the Board expressed the desire that, through factual stipulations and time management, the hearing could be concluded in late August. Id. at

15070. The Board asked the parties to continue discussing these scheduling matters among themselves prior to the next conference. Id. at 15061-62.

4. Summary Disposition. During the discussion about witnesses at the first conference call, the subject of summary disposition came up in the context of whether there was a genuine issue about the angles and speeds of historically documented incidents. Tr. 6/15 at 14933-34. While the Board encouraged the parties to enter into stipulations when possible (Id. at 14934), especially with the aggressive hearing schedule being undertaken, the Board cautioned that filing motions for summary disposition and responding to them take away from the parties' preparation time for a hearing, and it might be more time efficient simply to have a witness testify, especially if the subject matter is as clear as the potentially moving party believes. Id. at 14936.

On that basis, the Board decided to foreclose filing of motions for summary disposition as to the issues involved in the upcoming hearing. Id. at 14942-43, as authorized by CLI-03-05 herein, 57 NRC 279, 284 (2003); cf. 10 C.F.R. § 2.749(a)(last sentence). Once again, however, the Board strongly encouraged stipulations on any subissues about which there might be little controversy or which might prove to be of little consequence. Tr. 6/15 at 14943.

5. Time Allocation. After discussing the matter briefly with the parties during the first conference call (Tr. 6/15 at 14952-61), the Board decided to take up cross-examination times at the July 1 prehearing conference. Id. at 14971-72. The Board instructed the parties to further discuss the time allocations among themselves before that conference. The Board also expressed its belief that reserving only 9 percent of the hearing time (or some 5 1/2 minutes per hour) to questions from the Board seemed on the low side, and the parties agreed to take that into consideration when re-calculating the time allocations. Id. at 14957-59.

At the second conference call, the Board and the parties discussed time allocations for each side at some length. Tr. 7/1 at 15027. The Staff and Applicant had both developed time allocation percentages that were unacceptable to the State. Id. at 15027-28. The State expressed its belief that, since the Staff and the Applicant hold essentially the same view on issues, they should not be afforded more time to present their collective case than the State. Id. at 15031-32, 15045-46. The Staff and Applicant responded that, while they may have reached similar conclusions, they had arrived at the conclusions that they wish to present during the hearing using independent analyses, and in any event have different roles to fulfill at the hearing. Id. at 15048-52. The Board noted that the difference in time between what the State wanted, and what the Staff and Applicant had proposed, was very small. Id. at 15052-53.

During the course of the discussion, the Board referred to the hearing time that could be conserved by developing a system for pre-marking of exhibits, rather than interrupting the hearing while the court reporter marked them. Id. at 15033-37. (As to other matters relating to exhibits, see ¶ 9, below.) The parties agreed to further discussions to explore all these matters. Id. at 15054.

After more discussion, the Board asked the parties about the possibility of them providing the Board with more specific time estimates, such as how much time a party expected to need for each witness, and reserved this discussion for the July 15 conference call. Id. at 15054-62. The Board's ultimate goal, of course, is to develop "a better management tool" for controlling the length of the parties' presentations, both on direct and on cross-examination. Id. at 15057.

6. Stipulations. During the first conference call, the Board indicated that the topic of stipulations should be addressed in greater detail at the July 1 prehearing conference and asked the parties to discuss that topic among themselves before the next conference call. Tr. 6/15 at 14971. During the second conference call, the parties stated that they were currently

working on stipulations and would be more prepared to address that topic during the July 15 call. Tr. 7/1 at 15025-27.

7. Motions in Limine. At the first conference call, the Board and the parties discussed the pending motions in limine. Tr. 6/15 at 14973-87. The Board tentatively reserved Thursday, July 15, to hear telephonic oral arguments on the motions. Id. at 14987-88. In the interest of communication ease, it was suggested that oral argument could be conducted in a manner that would eliminate any need to refer directly to Safeguards information as such. Id. at 14992.

At the second conference call, the Board reviewed the status of the three motions in limine then pending before the Board: (1) the Applicant's motion of June 9; (2) the State's motion of June 15; and (3) the State's motion of June 28. Tr. 7/1 at 15009. With regard to the Applicant's motion of June 9 concerning the State's treatment of an ordnance-related matter, the Board noted that the State's response seemed to include a cross motion that sought, should the original motion be granted, to exclude some of the Applicant's evidence on similar theories. Id. at 15010. Upon the Board's inquiry, the State indicated that indeed it was its intent to have presented a cross-motion. Ibid. Again upon Board inquiry, the Applicant indicated that it would like to respond to the State's cross-motion (Ibid.), and the Staff indicated that it might also wish to respond. Id. at 15012. The Board thereupon called for briefs of the Applicant and the Staff in response to the cross-motion on July 13. Id. at 15010-12.

With respect to the State's June 15 motion, the Board focused on the argument that if the Staff were allowed to submit evidence on the casks as originally designed, rather than on just the changed cask now planned to be used, then the State must be given time to analyze the original cask, with the result that the hearing would necessarily be postponed from its August 9 starting date until such analysis could be completed. Id. at 15012-21. The Board asked both the Applicant and the Staff to address the legitimacy of this argument. The Staff urged that the matter was of little consequence because the Board was not going to be asked

to rule on the adequacy of the older cask, but rather only on the newer cask, and the information on the old cask was being offered only for historical significance. Id. at 15017-19. The Board, noting that the Staff's and Applicant's responses to the State's motion were due that day, asked the State to file a brief reply, due on July 13, to those responses. Id. at 15019-20.

The final motion in limine to consider was the State's motion of June 28 dealing with the scope of the historical flights to be considered. It had been contemplated that the Staff's and Applicant's briefs would be due on July 13, but the Board directed that those briefs be filed July 12. Id. at 15021-22. [Later extended one day, by Order dated July 9].

The Board asked the parties if they intended to file any more motions in limine. The Staff indicated that it did wish to file a motion regarding an alleged lack of expert support for some of the State's evidence. Id. at 15023. The Board noted that matters addressing the strength of evidence are best addressed during the hearing, especially since motions in limine use up Board and party resources at a time when all need to be preparing for an upcoming hearing. Id. at 15023-25. The Board confirmed that oral arguments on the pending motions in limine would be held during the July 15 conference call. Id. at 15009.

8. Building Access. During the second conference call, the Board noted the time consumed by the security process the outside parties had to follow to gain entry to NRC headquarters during the previous hearing. In light of this past problem, the Board will be working with security to attempt to expedite the parties' entry into the building so as neither to delay their arrival at the hearing room nor to force them to allow inordinate time to assure their prompt arrival. Tr. 7/1 at 15005-06.

9. Document Procedures. At the second conference call, the State brought up the matter of numbering exhibits. After some discussion, the Board asked each party to determine where it believed the numbering left off during the last hearing, and then send an email to the Board and the other parties to provide an opportunity to confirm this information about the

exhibits previously submitted to the Board. Tr. 7/1 at 15037. In the interest of avoiding any confusion during any later appellate review, the Board decided that, notwithstanding that the upcoming hearing involved a discrete issue not previously litigated, the numbering of new exhibits should, for each party, simply continue in numerical progression from the last exhibit, rather than employ an issue-related prefix designation that would allow numbering to begin anew. Id. at 15036.

The Board also discussed the manner in which the parties should submit pre-filed testimony and exhibits. Again after some discussion, the Board determined, and the parties agreed, that the exhibits should be filed separately in an exhibit binder. Id. at 15040-41. Only the witnesses' professional qualifications or resume should be appended to the testimony itself. The Board also stated that, in the interest of conserving filing space for Safeguards materials, the parties should not provide courtesy copies of the new exhibits to the Board when they are presented at the hearing (so long as they are identical to the pre-filed version [or can be made so through simple hand-marked changes]). The Board would, however, like the parties to continue to provide courtesy copies if they need to refer to previously-admitted, non-Safeguards exhibits. Id. at 15043.

The final procedural matter the Board and parties discussed was whether documents should have print on one side, or both sides, of the paper. Id. at 15043-45. The Board and the parties decided that the benefits of consuming and filing a lesser volume of paper when documents are double-sided were outweighed by the inconveniences that attended reproducing

and reading such documents, compared to single-sided ones. Id. at 15045. Therefore, documents are to be printed on only one side of the paper.

As reflected above, the upcoming July 15 conference call -- at 11:30 A.M. EDT (9:30 A.M. MDT) -- will involve: (1) confirming stipulations among the parties; (2) allocating hearing time among the parties and setting the projected length of the hearing and scheduling its sessions; and (3) holding oral argument on the pending motions in limine. Tr. 6/15 at 14970-73; Tr. 7/1 at 15062.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

By Michael C. Farrar
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 14, 2004

Copies of this Memorandum and 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.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
PRIVATE FUEL STORAGE, L.L.C.) Docket No. 72-22-ISFSI
)
(Independent Spent Fuel Storage)
Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (SUMMARIZING JUNE 15 AND JULY 1 PREHEARING CONFERENCE CALLS) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Michael C. Farrar, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Peter S. Lam
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Sherwin E. Turk, Esquire
Catherine L. Marco, Esquire
Laura C. Zaccari, Esquire
Office of the General Counsel
Mail Stop - 0-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Diane Curran, Esquire
Harmon, Curran, Spielberg
& Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036

Joro Walker, Esquire
Director, Utah Office
Western Resource Advocates
1473 South 1100 East, Suite F
Salt Lake City, UT 84105

Martin S. Kaufman, Esquire
Atlantic Legal Foundation
205 E. 42nd St.
New York, NY 10017

Docket No. 72-22-ISFSI
LB MEMORANDUM AND ORDER
(SUMMARIZING JUNE 15 AND
JULY 1 PREHEARING CONFERENCE CALLS)

Denise Chancellor, Esquire
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, UT 84114

Jay E. Silberg, Esquire
D. Sean Barnett, Esquire
Shaw Pittman
2300 N Street, NW
Washington, DC 20037-1128

John Paul Kennedy, Sr., Esquire
David W. Tufts, Esquire
Confederated Tribes of the Goshute
Reservation and David Pete
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, UT 84105

Richard Wilson
Department of Physics
Harvard University
Cambridge, MA 02138

Tim Vollmann, Esquire
3301-R Coors Road N.W., #302
Albuquerque, NM 87120

Paul C. EchoHawk, Esquire
ECHOHAWK LAW OFFICES
151 North 4th Avenue, Suite A
P.O. Box 6119
Pocatello, ID 83205-6119

Joseph R. Egan, Esquire
Martin G. Malsch, Esquire
Egan Fitzpatrick & Malsch, PLLC
7918 Jones Branch Dr., Suite 600
McLean, VA 22102

Stephen L. Simpson, Esquire
Office of the Solicitor
Department of the Interior
Division of Indian Affairs
1849 C Street, NW, Mailstop 6456-MIB
Washington, DC 20240

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of July 2004