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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

In the Matter of	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC	ASLBP No.97-732-02-ISFSI
(Independent Spent Fuel Storage Installation)	July 22, 2004

MEMORANDUM AND ORDER
(Summarizing July 15 Prehearing Conference Call)

On July 15, 2004, the Board conducted what we expect to be the next to last of the numerous prehearing conference calls we and the parties to this proceeding have been holding over the last several months. Those calls have all been in preparation for the hearing -- which is set to begin August 9 -- on the last issue pending before us, determining the likelihood that a cask breach would be the consequence of an accidental crash of a military jet into the proposed temporary storage site for spent nuclear fuel.

The July 15 call began with oral argument on three pending motions in limine seeking to exclude or to limit certain proffered testimony, and then turned to a number of scheduling and administrative matters. The Board announced its decision on all three motions during the course of the call. The reasoning behind those rulings, as well as the procedures agreed upon during the remainder of the call, should serve to promote the effective and efficient use of hearing time. All those matters are summarized below.

In order to receive reports on open items, to resolve any last-minute problems, or to confirm that all is in readiness, the Board has scheduled a brief prehearing conference call the week before the hearing starts. That call will be held on Tuesday, August 3, 2004, at 3:00 P.M. EDT (1:00 P.M. MDT).

1. Stipulations. The parties stated that they were still discussing whether they will be able to enter into any stipulations that would eliminate the need to hear certain matters. Those discussions are focusing on two matters, involving the canister transfer building and jet fuel fires. The parties will keep the Board apprised of their progress. It seems unlikely that the hearing can be concluded in the time now allotted (see ¶ 3, below) unless stipulations are indeed reached on those two matters. Tr. at 15079, 15156, 15179.

In connection with reporting on stipulations, the parties should also report on their continuing discussions about setting time allocations for cross-examination, for which the Board has been pressing. The parties should also be considering how those time allocations should tie in with their filing of the cross-examination plans referred to in 10 C.F.R. § 2.743(b)(2).

2. Motions in Limine. The three motions in limine on which the Board heard oral argument are described below. So too is the essence of the rulings the Board made thereon during the conference call, and the guidance those rulings provided for the shaping of the evidence at the hearing.

a. Applicant's Motion of June 9, 2004. By this motion, the Applicant sought to exclude State testimony that assertedly recalculated the probability of impact by jettisoned ordnance. Tr. at 15082. Both the Applicant and the Staff argued that the Board's "probability" decision (LBP-03-04, 57 NRC 69 (March 10, 2003)) made explicit findings on that probability that established the law of the case and operated to exclude the State's analysis. Id. at 15084, 15086.

The State responded that the probability in the last hearing was based on the number of flights, not the number of ordnance. Id. at 15087. The State also argued that the issue previously decided involved the probability that the 99 acre site would be hit, not the probability that a smaller target, a cask, would be hit and breached. Id. at 15088. Therefore, the State argued, the law of the case doctrine is no bar to its evidence.

The Board pointed out that its previous decision was based on the (varying) number of flights going through Skull Valley annually carrying ordnance, and did not turn on the (also varying) number of ordnance on each such flight. Id. at 15100-01. With respect to the issue now before the Board (involving an impact by ordnance on a smaller target area), then, the number of ordnance that could have such an impact and their perhaps different drop paths do become significant. Id. at 15094-96. On this basis, the Board denied the Applicant's motion and in doing so provided guidance as to matters to be explored further at the hearing.

In its response to the Applicant's Motion, the State had included a cross-motion -- seeking to exclude certain of the Applicant's evidence on a theory similar to that on which the Applicant's motion was based -- that it wished to have addressed if the Applicant's theory had prevailed on the main motion. With the Board's denial of the Applicant's motion, the State's cross-motion was, as the State conceded, rendered moot. Id. at 15102-03.

b. State's Motion of June 15, 2004. In the second motion, the State sought to prevent the Staff from presenting a report analyzing the unmodified version of the cask previously intended to be used at the facility but now replaced by a changed version. Tr. at 15106. The State contended that any analysis of the unmodified cask was irrelevant, and that the issue is not whether the modified cask is safer than the unmodified cask, but whether the modified cask can withstand the impact of an F-16. Ibid. The State further argued that to let the evidence into the proceeding would increase the length of the hearing and could introduce bias. Id. at 15106-07. In addition, the State claimed, denying the motion would undermine the parties' settlement of Contention TT where, among other things, the State agreed to drop that contention in exchange for the Applicant adopting additional procedures to accompany use of the modified cask. Id. at 15107, 15123-25, 15128-29, 15131-32. The State further pointed out that it had been prepared, before the Applicant adopted the modified cask, to prove at the hearing the unacceptability of the original cask, and that it did not want to lose that opportunity if the

Applicant, relying on the Staff's analysis, later sought (assuming it received a license based on the modified cask) to win post-licensing approval of the original cask. Id. at 15128-29.

The Staff responded that the analyses of the unmodified and modified casks were in the same report and essentially inseparable. Id. at 15114. The Staff and the Applicant also argued that the Staff's use of the report does not affect the agreement between the Applicant and the State both because (1) the Board will not be asked in this proceeding to pass upon the analysis of the unmodified cask (Tr. at 15116-17) and (2) in the settlement agreement, the Applicant reserved the right to attempt to return to the unmodified cask if it so chose. Id. at 15119-20, 15122-23. The Staff noted that the only issue before the Board was whether the modified cask was safe, and that any discussions about the settlement and the Applicant's future use of the unmodified cask were therefore irrelevant in the present proceeding. Id. at 15112, 15120.

After hearing the arguments, the Board denied the State's motion, but granted the State's request to introduce its own analysis of the unmodified cask. Id. at 15136. The Board also stated that it would make note of the State's concerns in its eventual decision and would expressly reiterate therein that the Board's ruling concerns the safety of the modified cask, not the unmodified cask, and that (1) it was not passing judgment on the validity of any evidence regarding the unmodified cask and (2) nothing in the State's course of conduct in vigorously pursuing this issue could be deemed to constitute a waiver of any future rights with respect to challenging the unmodified cask. Id. at 15136-37.

c. State's Motion of June 28, 2004. In the third motion, the State sought to exclude data from a number of historic F-16 crashes -- including any that involved ejections made below 2000 feet altitude -- from the class of "Skull Valley-type events" considered in evaluating "speeds and angles" of crashes for purposes of determining cask breach risks. Tr. at 15137. The State stated that it wished to exclude these flights because the lower the pilot's ejection, the more slowly the aircraft hits the ground. Id. at 15139. The State offered several reasons why flights below 2000 feet should be excluded, including that the Applicant's lodged appeal

argues that pilots will not eject below 2000 feet (Tr. at 15144-45) and that pilots ejecting below 2000 feet are disobeying orders. Id. at 15146-47.

The Applicant and the Staff argued generally that now is not the time to be excluding evidence, but rather that the State should challenge the validity of the Applicant's and Staff's analysis during the hearing. Id. at 15149, 15152-53. In particular, however, they believed that the per se exclusion of flights involving ejections below 2000 feet would be inconsistent with our prior rulings.

After listening to the parties' arguments, the Board denied the State's motion on the ground that any determination of which historic flights properly belong in the database for present purposes is generally a matter for debate among the experts testifying at the hearing. Id. at 15153-54. The Board pointed out that categorization of flights as "Skull Valley-type events" for present purposes may involve different criteria than were applied at the earlier hearing for other purposes. Id. at 15144.

In that regard, however, the Board did express the view that a basis of its prior ruling rejecting the Applicant's proposed "R" factor was that the evidence made clear that pilots could not be counted on to follow their instructions to eject above 2000 feet. That being so, it appeared that the law of the case would bar any argument that flights involving ejections below 2000 feet could, for that reason alone, not be considered. Id. at 15138, 15154.[1] The Board

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[1] The Board did grant the State's request for permission, at its option and at a prehearing time of its choosing, to file a brief on the subject, seeking to persuade the Board to adopt a different ruling. Tr. at 15154-55. If such a brief is received, the Board will consult with the parties as to the timing of a reply, so as not to interfere unduly with their trial preparation.

In light of the content of the State's motion, after the conclusion of the call the Board set for itself a goal of announcing (if the parties believe it would be helpful), at or shortly after the conclusion of the August evidence on "angles and speeds," its preliminary thinking on any controversies that may exist concerning whether particular accidents or groups of accidents should be excluded from consideration as not representative in establishing the likely trajectories of "Skull-Valley-type" crashes. Such an announcement, although subject to later revision when the parties file their post-hearing papers, might help the parties reshape their September presentations (see ¶ 3, below).

also noted that, to the extent that there is controversy at the hearing about which "speed and angles" evidence is relevant and material, the witnesses on related subjects should be prepared to indicate how their testimony would change depending on the "speeds and angles" outcome. Id. at 15154-55.

3. Hearing Length. The parties and the Board continued the discussions that had been going on almost from the beginning of this phase (see, e.g., September 9, 2003, Scheduling Order and Report, pp. 3-4;[2] February 27, 2004, Order Summarizing Prehearing Conference Rulings, p. 4; and April 23, 2004 Scheduling Order, p. 3) about the length of time that would be needed for the hearing, and revisited the timing of the hearing sessions. Tr. at 15156. The Board pointed out again that normally the actual amount of hearing time available per day would be only about 6 hours (after factoring in breaks). Id. at 15164. The Board discussed several possibilities for making the hearing day longer, including shortening breaks, beginning earlier in the morning, ending later in the evening, and possibly holding the hearing on a weekend day. Id. at 15165.

The system adopted for this hearing -- with pre-filed direct testimony that anticipates and responds to the other side's arguments to the extent they are known, followed by pre-filed rebuttal testimony -- should conserve hearing time that would otherwise be consumed with delivering rebuttal testimony orally. In addition, after a witness adopts the pre-filed direct and rebuttal testimony, the witness will be asked also to respond to the other side's pre-filed rebuttal testimony. Id. at 15162-63. This should reduce the back-and-forth nature of the cross, re-direct, re-cross, etc., examination, and result in less frequent or lengthy witness returns to the stand to address "rebuttal" matters. Id. at 15163-64.

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[2] In that document, we indicated that we had "refused to accept the Applicant's schedule that would have had us attempting to take the testimony of 20-25 witnesses in two weeks (10 days) of hearing." Instead, we "insisted that, even if some witnesses are grouped in panels . . . we needed to allocate almost three weeks (14 days) to the hearing." As will be seen (p. 7, below), the parties have now agreed that hearing 18 witnesses/panels will take 15 days.

In order to further expedite the hearing process, and given the degree of preparation of the parties and the Board, the Board suggested that the parties approach cross-examination by dispensing with unnecessary inquiries to establish background or context. Instead, the Board expects that, rather than spend time recounting a witness' direct testimony (absent some real purpose in doing so), a cross-examiner will proceed directly to the substance of the challenge. Id. at 15177-78.

The parties and Board also discussed the timing of the hearing sessions and the order in which the issues will be addressed therein, given the availability of the eighteen sets of witnesses or witness panels involved in the direct testimony, which was timely pre-filed on July 12. The hearing is set to begin Monday, August 9, and run for 10 days -- through that week and the next -- until Friday, August 20. The hearing will resume for two days during the next week, from noon Tuesday, August 24 to noon Thursday, August 26. Id. at 15179.

In the first eight days of that twelve-day August session, the witnesses on "structural" issues will be heard. Id. at 15157-58. During the last four days of that session, the witnesses on the "speed and angles" associated with the historic F-16 crashes will be heard. Id. at 15166-67.

After a recess during the week before and the week of Labor Day (the latter of which could not be used due to witness unavailability, Tr. at 15168), the hearing will resume on Monday, September 13 for three days to hear all matters relating to the issue of the probability that a crash into the storage area would have cask breach consequences. Id. at 15167. If needed, and given that the parties will have had ample time over the break to prepare, the Monday and Tuesday hearings will run for longer than normal hours, so that on Wednesday, September 15, the hearing can adjourn in time to permit appropriate observation of the sundown start of the Jewish holidays by those doing so. Tr. at 15173.

Maintaining the above schedule is in part dependent upon the parties reaching stipulations on the issues concerning (1) the significance of possible jet fuel fires and (2) the

structural aspects of the canister transfer building. If it appears the hearing cannot for any reason be concluded on September 15, an additional session will be scheduled at a time, likely the next week, during which the remaining witnesses are available. Id. at 15176.

4. Building Access. The Board reiterated that it was working with security personnel to streamline the parties' entrance into the NRC headquarters building. Tr. at 15164. The Board also noted that the parties would be able to gain access on the Sunday before the hearing (August 8th) to the conference rooms available to each of them adjacent to the NRC hearing room. This will allow the hearing to start up the next day without wasting that morning on organizational tasks. Id. at 15194.

5. Document Handling. The parties and the Board discussed the number of copies of documents the parties would need to present at the hearing. That matter is of more importance than usual because of the Safeguards character of the documents and the need to protect all sets of those documents properly. Id. at 15179. We therefore go into more detail here than we would otherwise.

a. Testimony. As to testimony, the approach the Board settled upon in consultation with the parties -- as amended numerically by the Board's later ascertainment of the precise needs of other affected NRC offices (the Office of the Secretary, where the official record is kept, and the Office of Commission Appellate Adjudication, which assists the Commissioners when they are called upon to review our decisions) -- is as follows:

- Board members will rely upon their copies of the pre-filed testimony and are not to be given an additional copy at the time of the hearing. Id. at 15179.
- Any corrections to that pre-filed testimony discovered pre-trial will be indicated on the appropriate page of the testimony, by hand marking or electronic means that shows both the original and the corrected language. Copies of the marked-up pages will be made available to each Board member and to each opposing

counsel, in advance of the witness/panel's appearance if possible, to substitute in the pre-filed copy each previously received. Together with the next step outlined below, this will eliminate the need to use hearing time for a witness to recite, and the parties to record, the corrections.

- When the witness/panel takes the stand to adopt the pre-filed testimony, counsel will present to the Court Reporter two copies of the entire testimony, as corrected (Tr. at 15186, as amended numerically per above) -- including, so as to preserve the nature of the corrections, the same marked-up pages provided to the Board members and to opposing counsel -- for binding "as if read" in two full-page copies of the Transcript. Id. at 15186. After those copies are produced by the Court Reporter the next day and checked by Board personnel for accuracy, they will be delivered by the Board to SECY and OCAA.
- After the conference call, the Board also determined that its personnel would need one additional copy of the corrected testimony, which shall be made available either before, or at the time, the witness/panel takes the stand. In total, then, the parties will need to provide three copies of the corrected testimony, two to the Court Reporter and one to the Board.
- The Board expressed its preference for a "mini-script" copy of the transcript, wherein four pages of testimony appear on one page. The parties also indicated they would prefer the mini-script to the normal size transcript (Tr. at 15180). They will later need to advise as to the number each requires.

b. Exhibits. As to exhibits, the Board indicated it would work with the courtesy copies of current exhibits already filed, and did not want to receive another copy at the time an exhibit is introduced (as to exhibits from the previous hearings that a party may wish to rely on for this hearing, four courtesy copies should provided the Board). Id. at 15187. Because the parties

wish to take the same approach, each party should, at the time of presenting an exhibit, put forward only two copies, in the fashion described below.

The Board presented a new approach to marking exhibits for identification, designed to eliminate the time wasted when the proceedings have to stop while the Court Reporter marks numerous exhibits for identification:

- The Board directed the parties to pre-mark the exhibits, utilizing a stamp the Board will provide to each party. That stamp will include the case name, docket number, and party name (see sample stamp at end of this document), so that all the party need do is enter the exhibit number and the identity of the witness/panel (shorthand notation will suffice) through which it is intended to be introduced. Id. at 15187-90.
- The stamp should be placed in the upper right-hand corner if possible; if not, any location on the first page is acceptable. Id. at 15189.

The Board will wish to review quickly with counsel during the brief August 3 conference call the manner in which the exhibits will be presented. Although at their initial appearance exhibits are usually presented to the Court Reporter "to be marked for identification," that step will have already been taken by the party, and the Court Reporter will not be involved in any later handling of the exhibits. Accordingly, while it may be appropriate to use the classic phraseology for purposes of the record, it would seem that the exhibits should simply be handed to Board personnel, who can mark the date at that time and then later complete the markings when the exhibit is later offered and ruled upon, as well as insert the "Tr." references.

Board personnel will deliver one copy of the exhibits (and one copy of the full-size transcript with bound-in testimony) to OCAA periodically during the hearing. The other, official copy of the exhibits (the only one assured to have all required information properly marked on the stamp) will be delivered to SECY at the end of the proceeding, as has been customary.

6. Exhibit List. Although this was not discussed at the conference call, the Board would like each party to email its previously-filed exhibit list to our law clerk at ACR2@nrc.gov. We will re-format those lists into a log sheet for tracking the action taken on the exhibits.

The parties will follow the administrative procedures outlined above, all of which should result in conservation of hearing hours for substantive purposes. The upcoming August 3rd conference call at 3:00 P.M. EDT (1:00 P.M. MDT) will provide all an opportunity to clarify any matters that may need to be addressed to insure that the hearing runs efficiently (Tr. at 15193) and to report on open matters (see ¶ 1, above).

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

_____
Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 22, 2004

SAMPLE STAMP FOR PRE-MARKING EXHIBITS:

_____

U.S. N.R.C. In the Matter of State of Utah Exhibit
PRIVATE FUEL STORAGE, LLC #
Docket # 72-22-ISFSI ----------
Date Marked for I/D _____, 2004 (Tr. p. _____)

Date Offered _____, 2004 (Tr. p. _____)

Through Witness/Panel_____

Action Taken: ADMITTED REJECTED WITHDRAWN

DATE: _____, 2004 (Tr. p._____)

_ _____

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.

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 JULY 15 PREHEARING CONFERENCE CALL) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of July 2004