

RAS 1801

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 06/12/00

SERVED 06/12/00

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

PRIVATE FUEL STORAGE, L.L.C.

(Independent Spent Fuel Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

June 12, 2000

MEMORANDUM AND ORDER
(Ruling on In Limine Motions and
Providing Administrative Directives)

Pending before the Licensing Board are a series of motions filed by intervenor State of Utah (State), applicant Private Fuel Storage, L.L.C., (PFS), and the NRC staff seeking to strike portions of prefiled testimony and exhibits relating to the three contentions --

Utah E/Confederated Tribes F, Financial Assurance, Utah R, Emergency Plan, and Utah S, Decommissioning -- that are scheduled for hearing beginning Monday, June 19, 2000. Board rulings on these motions are set forth below, as well as an administrative directive regarding further party filings to address these rulings and other matters.

- A. May 25, 2000 State Motion to Compel PFS to Produce Documents or Strike Prefiled Testimony Regarding Contention Utah E/Confederated Tribes F

DISCUSSION: [State] Motion to Compel [PFS] to Produce Documents Relied on in Witnesses' Pre-filed Testimony or in the Alternative Motion to Strike Testimony (May 25, 2000) [hereinafter State Motion to Compel] at 4-10; [PFS] Response to [State] Motion to Compel [PFS] to Produce Documents Relied on in Witnesses' Pre-filed Testimony or in the Alternative

Motion to Strike Testimony (June 7, 2000) at 3-10 (converted electronic version) [hereinafter PFS Production Response].

RULING: At issue are two items -- the Service Agreement between PFS and its future customers and a legal analysis of PFS state sales tax liability prepared by a Salt Lake City, Utah law firm for PFS at its request -- and the May 15, 2000 prefiled testimony of John Parkyn and Jon Kapitz on PFS facility (PFSF) operation and maintenance costs that references those materials (answers to questions 38, 44, 45, 97, 100, 108, 110). As to the first item, in the context of litigating the contention Utah E/Confederated Tribes F cost estimate and on-site property insurance matters still before us, we agree with PFS that it is the requirements that will be included in every agreement (i.e., the PFS commitments), not the specific terms of the Service Agreement, that are relevant. Accordingly, we deny the State's May 25, 2000 motion to compel/to strike relative to this request.

On the other hand, as is apparent from question 100 of the prefiled testimony and the corresponding answer of John Parkyn, the sales tax report clearly is relevant to this proceeding given that it is identified as the "basis" for the estimated sales tax costs. Testimony of John Parkyn and Jon Kapitz on the Operation and Maintenance Costs of the PFSF Contention Utah E/Confederated Tribes F (May 15, 2000) at 25. Notwithstanding the PFS assertions of attorney-client privilege relative to this report, we find its witness' reliance on that report as the basis for those cost estimates is sufficient in this context to require disclosure of the report. See United States v. Nobles, 422 U.S. 225, 239 & n.14 (1982) (testimonial use of privileged material waives privilege); see also In re Sealed Case, 676 F.2d 793, 817-18 (D.C. Cir. 1982). Thus, as to the sales tax report, we grant the State's motion to compel and, absent some other

agreement between the parties, order that the sales tax report be provided to counsel for the State on or before 4:30 p.m. EDT on Wednesday, June 14, 2000.¹

- B. May 31, 2000 State Motion In Limine to Exclude Parts of Parkyn Prefiled Testimony on Contention Utah E/Confederated Tribes F

DISCUSSION: [State] Motion In Limine to Exclude Part of the Testimony Filed by John D. Parkyn, Contention E (May 31, 2000) at 4-8; [PFS] Response to State Motion to Exclude Testimony of John D. Parkyn on Utah Contention E (June 7, 2000) at 3-11 (converted electronic version); NRC Staff's Response to "[State] Motion In Limine to Exclude Part of the Testimony of John D. Parkyn, Contention E" (June 7, 2000) at 2-4.

RULING: The two items at issue here are portions of the May 15, 2000 prefiled testimony of John Parkyn on PFS facility construction cost estimates (answers to questions 19, 20, 22 through 26, 29, 31, 34, 35, 37, 38, 40, and 41) and on-site property insurance (answer to question 13). As to the construction cost estimate testimony, we find that the State's concerns about lack of foundation are grist for the cross-examination mill. The adequacy of the basis for Mr. Parkyn's testimony is a matter to be explored in that context. As to the on-site property insurance testimony, while both the State and the staff assert that Mr. Parkyn is providing legal conclusions and argument that should be struck, we do not agree. Mr. Parkyn appears to be providing the factual basis to support what will be the legal/policy claim by PFS that the reduced insurance coverage afforded decommissioned reactors should be applicable to

¹ We note in this regard that, given the language of State general interrogatory Nos. 5 and 10, see State Motion to Compel at 6 n.3, we are uncertain why this issue was not presented to the Board earlier. Nonetheless, although observing that the State could have inquired further when the sales tax report was identified during Mr. Parkyn's May 3, 2000 deposition, see PFS Production Response at 6-7, PFS makes no objection to the State's request on timeliness grounds.

Also regarding our production order, we note that if the document in question is considered to constitute proprietary information, the parties should make arrangements to treat it as such.

the PFS facility. Accordingly, on both counts, the May 31, 2000 State motion in limine regarding Mr. Parkyn's construction cost estimate and on-site property insurance testimony is denied.

C. May 31, 2000 PFS and Staff Motions In Limine to Exclude Parts of Sheehan Prefiled Testimony on Contention Utah S

DISCUSSION: [PFS] Motion to Strike Portions of Testimony of Michael Sheehan on Utah Contention S (May 31, 2000) at 3-5; NRC Staff's Motion In Limine to Exclude Portions of Prefiled Testimony of Michael F. Sheehan, Ph.D. Regarding Utah Contention S (May 31, 2000) at 4-5; NRC Staff's Response to "[PFS] Motion to Strike Portions of Testimony of Michael Sheehan on Utah Contention S" (June 7, 2000) at 1; [State] Response to Staff's and [PFS] Motions to Strike or Exclude Portions of Testimony of Michael F. Sheehan, Ph.D on Utah Contention S (June 7, 2000) at 1-4 (converted electronic version).

RULING: In contest are the answers to questions 8, 19, and 20 of the May 15, 2000 prefiled testimony of Michael F. Sheehan, Ph.D., regarding the "vintage" of the data underlying PFS's decommissioning cost estimates. Both PFS and the staff declare Dr. Sheehan's statements questioning the derivation of the "1997 dollar" figures used to compute the cost estimates go to a matter that is outside the scope of contention Utah S, as admitted. We find this matter is fairly within the scope of the contention, as set forth in the parties' April 7, 2000 stipulation that was approved by the Board on May 1, 2000. Consequently, the May 31, 2000 PFS and staff motions in limine regarding Dr. Sheehan's testimony on contention Utah S are denied.

D. May 31, 2000 Staff Motion In Limine to Exclude Parts of Wise Prefiled Testimony on Contention Utah R

DISCUSSION: NRC Staff's Motion In Limine to Exclude Portions of Prefiled Testimony of Gary A. Wise (May 31, 2000) at 3-6; [PFS] Response to NRC Staff Motions to Exclude Testimony and Exhibits of [State] (June 7, 2000) at 2-7 (converted electronic version)

[hereinafter PFS Exclusion Response]; [State] Response to NRC Staff's Motion In Limine to Exclude Portions of Prefiled Testimony of Gary A. Wise (Utah Contention R) (June 7, 2000) at 2-9 (converted electronic version) [hereinafter State Wise Response].

RULING: The staff, supported by PFS, asks that portions of the prefiled testimony of Gary A. Wise be struck as outside the scope of, or irrelevant to, contention Utah R. In particular, the staff objects to those parts of the testimony that concern purported PFS noncompliance with regulations of the federal Occupational Safety and Health Administration (OSHA); the adequacy of or need for an "organizational statement" regarding the PFS fire brigade; and PFS compliance with the National Fire Protection Association (NFPA) Standard 1500. We agree with the staff relative to the testimony regarding OSHA requirements. We disagree, however, with respect to the organizational statement and NFPA Standard 1500 questions. The State correctly notes that PFS has referenced NFPA 600 standards in developing and providing information for staff evaluation of the PFS Emergency Plan. In the case of the "organizational statement," the State claims there is a relevant NFPA 600 standard that has not been adequately addressed by PFS, a matter that we find can fairly be raised. As to the applicability of NFPA Standard 1500, not unlike the PFS assertion regarding on-site insurance coverage, the State is attempting to provide factual support for the claim that NFPA Standard 1500 rather than NFPA Standard 600 is an appropriate benchmark for evaluating regulatory compliance. We see no reason to strike this testimony either. Accordingly, the May 31, 2000 staff motion in limine to exclude portions of the prefiled testimony of Gary Wise on contention Utah R is granted as to the testimony's references to OSHA standards and is denied relative to the portions of the testimony regarding an "organizational statement" and NFPA Standard 1500.

In line with our ruling above, the following portions of the May 15, 2000 prefiled testimony of Gary Wise are hereby stricken and will not be admitted into the evidentiary hearing record of this proceeding:

1. On page 5, lines 2-3 of the answer to question six, strike “, nor has it complied with all of the requirements for fire brigades found in OSHA, 29 CFR § 1910.156. (State’s Exhibit 7.)”
2. On page 5, lines 7-8 of the answer to question six, strike “, and OSHA § 1910.156(b)(1)” and strike the quotation mark before “basic”.
3. On page 5, line 11 of the answer to question six, strike the quotation mark after “workplace” and the citation “OSHA § 1910.156 (b)(1).” We note in this regard that NFPA 600 § 2-1.2.1 appears to incorporate basically the same information as the OSHA regulation.
4. On page 7, line 9 from the top of the page, strike “OSHA § 1910.156(c)(1) and”.
5. On page 7, lines 5-7 of the answer to question seven, strike “Procedures under OSHA for fighting interior structural fires require what is termed ‘two-in two-out.’ See State’s Exhibit 9, OSHA regulation 29 CFR § 1910.134(g)(4). Under 29 CFR 1910(g)(4)” and capitalize the “w” in “when” to begin the sentence.
6. On page 7, lines 10-11 of the answer to question seven, strike the citation “29 CFR § 1910.134(g)(4), Note 1 to paragraph (g).”
7. On page 7, lines 13-14 of the answer to question seven, strike the phrase “meet the two-in two-out rule such that it could” and the phrase “and at the same time comply with OSHA.”
8. On page 8, line 4 from the top of the page, strike the phrase “, and thus, fails to comply with OSHA”.
9. On page 10, lines 10-11 of the answer to question eleven, strike the sentence “For the same reason, PFS would be in violation of OSHA.”
10. On page 10, line 15 of the answer to question eleven, strike the phrase “and OSHA”.

E. May 31, 2000 Corrected Staff Motion to Exclude Certain State Exhibits

DISCUSSION: NRC Staff’s (Corrected) Motion In Limine to Exclude Certain Exhibits

Filed by the State of Utah (May 31, 2000) at 1-7; PFS Exclusion Response at 7; State Wise

Response at 9; [State] Response to Staff's (Corrected) Motion In Limine to Exclude Certain Exhibits Filed by the [State] (June 7, 2000) at 1-6 (converted electronic version).

RULING: In light of the Board's ruling on the staff's May 31, 2000 motion in limine in section D above, we agree that Utah Exhibits 7 and 9 should be excluded and its motion is granted as to these exhibits. For the same reason, the staff's motion is denied as to Utah Exhibit 10. We also agree with the staff's reasoning relative to Utah Exhibits 30, 31, and 32 so that its motion to exclude is granted relative to those exhibits as well. We find, however, that the staff's argument relative to Utah Exhibit 53 goes to the weight, if any, the Board should give the June 29, 1995 letter so that its motion is denied regarding that exhibit. Finally, we agree with the staff that Utah Exhibits 1 and 35 should be updated to reflect the most recent versions of the documents in question, which the State apparently has done.

F. Other Administrative Matters Regarding Testimony and Exhibits

With these rulings, the Board is directing certain revisions to and exclusions from party prefiled testimony and exhibits. In addition, the Board requests that the parties make certain additional revisions to the materials submitted on May 15, 2000. Relative to the prefiled testimony of PFS witnesses John Parkyn and Hanson Pickerl regarding on-site insurance, the letters designated "Attachment 2" should be removed and marked as PFS exhibits and the testimony revised to reflect this redesignation. The same is true with regard to the three "figures" attached to the testimony of Ken Dugan and Wayne Lewis on fire protection. See Tr. at 1320. Further, because of the length of the curriculum vitae of State witness Michael Sheehan, the Board directs that this be designated as a State exhibit. In this regard, although the Board advised the parties that it would permit witness resumes to be included as attachments to their testimony, see Tr. at 1320-21, we direct that any curriculum vitae exceeding a total of ten pages in length for the testimony involved (whether for an individual or a panel) should be marked as an exhibit and introduced into the record as such.

In addition to these changes, we note that several of the exhibits submitted by the parties on May 15, 2000, relate to contention Utah H, Inadequate Thermal Design, which the State subsequently indicated it will withdraw. Therefore, these items would not be submitted as evidentiary materials. Given this development, as is the case with the various exhibits excluded in section E above, we see no reason why they should be given an exhibit designation.²

As a consequence, so that the Board and the parties will have an up-to-date set of information regarding these various changes, the Board directs that by facsimile transmission, e-mail, or other means that will ensure receipt by noon MDT on Thursday, June 15, 2000, each of the parties provide the Board, the Office of the Secretary, and the other parties with the following items:

1. A revised exhibit list that renumbers the party's exhibits to incorporate the various changes discussed in sections D-F above.
2. Revised prefiled witness testimony that reflects the testimony and exhibit changes discussed in sections D-F above.
3. An alphabetical list of all those individuals who may be attending any closed hearing sessions regarding contention Utah E on the party's behalf .³

² Also in this regard, we note that the parties have filed several motions relating to contention Utah H testimony and related documentation, which are now moot. Also pending with the Board is a PFS brief regarding the scope of contention Utah S, basis one. According to the State, the issue presented by this document is not ripe given the State did not refer to the storage cask decommissioning costs at issue in the testimony of its witness, Dr. Sheehan, regarding that contention. We agree and, accordingly, express no opinion at this time regarding the matter.

³ Relative to these lists, the Board anticipates that the party providing the individual's name will have taken steps to ensure, and will be able to advise the Board before going into closed session on the contention, that the listed individuals who are in attendance at the session have executed any nondisclosure agreement that may be necessary. Although party additions to these lists will be permitted, the Board anticipates that any party who seeks to add to its list of closed session attendees will have taken steps to ensure that the new individual has executed any required nondisclosure agreement. Failure to do so may result in the individual being excluded from the session.

Also, by that same date and time, the State should provide its submission withdrawing contention Utah H.

Conforming paper copies of these submissions should be (1) sent to the Office of the Secretary, the Board members, and the parties by first-class mail; and (2) distributed on Monday, June 19, 2000, prior to the start of the evidentiary hearing to the Board members and those parties in attendance.⁴

Finally, any party that wishes to provide written rebuttal testimony, either in whole or in part, should advise the Board at the close of all cross and redirect examination relative to the individual/witness panel to which the rebuttal testimony applies so that a prefiling schedule can be established.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁵

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

June 12, 2000

⁴ The parties are reminded that they will need to provide the court reporter with a copy of their prefiled testimony for incorporation into the transcript.

⁵Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PFS (2) intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; (3) petitioner William D. Peterson; and (4) the 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 (RULING ON IN LIMINE MOTIONS AND PROVIDING ADMINISTRATIVE DIRECTIVES) 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

Administrative Judge
G. Paul Bollwerk, III, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

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

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

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

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

Joro Walker, Esquire
Land and Water Fund of the Rockies
2056 East 3300 South, Suite 1
Salt Lake City, UT 84109

Docket No. 72-22-ISFSI
LB MEMORANDUM AND ORDER
(RULING ON IN LIMINE MOTIONS
AND PROVIDING ADMINISTRATIVE
DIRECTIVES)

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

John Paul Kennedy, Esquire
Confederated Tribes of the Goshute
Reservation and David Pete
1385 Yale Avenue
Salt Lake City, UT 84105

Richard E. Condit, Esquire
Land and Water Fund of the Rockies
2260 Baseline Road, Suite 200
Boulder, CO 80302

William D. (Bill) Peterson
Pigeon Spur Fuel Storage Facility
2127 Lincoln Lane
Holladay, UT 84124

Jay E. Silberg, Esquire
Shaw Pittman
2300 N Street, NW
Washington, DC 20037

Richard Wilson
Department of Physics
Harvard University
Cambridge, MA 02138

Danny Quintana, Esquire
Skull Valley Band of Goshute Indians
Danny Quintana & Associates, P.C.
68 South Main Street, Suite 600
Salt Lake City, UT 84101

[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of June 2000