

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

'98 AUG 20 P1:22

Before Administrative Judges:

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

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATION STAFF

SERVED AUG 20 1998

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

August 20, 1998

MEMORANDUM AND ORDER
(Additional General Schedule
Guidance and Informal Discovery
Status Conference Schedule)

In a June 29, 1998 memorandum and order, the Board provided a general schedule for litigating admitted contentions, along with associated guidance regarding the conduct of this adjudication. Also in that June 29 issuance, we requested that the parties provide the Board with a joint report on the status of the ongoing informal discovery process. Thereafter, applicant Private Fuel Storage, L.L.C. (PFS), intervenor State of Utah (State), and the NRC staff provided comments on the general schedule, as well as the impact of a July 28, 1998 Commission statement of policy on the conduct of adjudications, see CLI-98-12, 48 NRC ____ (July 28, 1998) (63 Fed. Reg. 41,872 (1998)). In addition, on behalf of all the parties to this proceeding,

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applicant PFS submitted an August 14, 1998 informal discovery status report.

After reviewing the general schedule and Commission policy statement comments and the joint discovery status report, we provide (1) additional scheduling directives and guidance, and (2) a proposed schedule for a telephone status conference on informal discovery.

I. GENERAL SCHEDULE DIRECTIVES/GUIDANCE

A. State Comments

In its July 7, 1998 comments on the Board's schedule, the State raised concerns about (1) deadlines that key off of staff deadlines for the issuance of the draft and final environmental impact statements (EIS); (2) the need for a mechanism to reopen formal discovery when there is a substantial period between the close of discovery and the hearing date on a group of contentions; (3) the possibility of burdensome or unrealistic deadlines because of a convergence of obligations for different groups of contentions; and (4) the need for additional time to respond to interrogatories beyond the seven days provided by the Board. Thereafter, commenting on the Commission's policy statement in an August 10, 1998 filing, the State suggested that beginning hearings before a staff SER is issued may not expedite the proceeding because of the potential effect on

the staff's ability to complete its technical review and expressed concerns about the policy statement's observations that only one round of discovery against the staff be permitted and that discovery be suspended against the staff until its safety and environmental review documents are issued.

The State's comment concerning interrogatory response time we address in section I.B.1 below relative to similar objections expressed by PFS and the staff. In connection with its three general schedule deadline concerns, as the staff notes in its July 9, 1998 response (which was adopted by PFS in a July 15 filing), these seem premature. Discovery cutoffs or other deadlines are subject to extension (or reopening) for good cause shown, which could include unforeseen complications such as a substantial delay in the staff's schedule for providing its environmental documents. Moreover, given the staff's comments thus far about the length and timing of discovery, see NRC Staff Comments on the Schedule in Light of the Commission's Policy Statement on Conduct of Adjudicatory Proceedings (CLI-98-12) (Aug. 10, 1998); see also Tr. at 812-13, the State's policy statements comments about pre-SER issuance hearings interfering with the staff's technical review and multiple round or pre-SER/EIS issuance discovery against the staff likewise do not appear to be problems at this juncture.

B. PFS Comments

The applicant's July 7, 1998 comments on the general schedule (which were adopted by the staff) focused on two matters: the length of time permitted for interrogatory and motion to compel/motion for protective order responses and the strictures placed on dispositive motions. Further, commenting on the Commission's policy statement in an August 10, 1998 filing, PFS declared that statement does not require any changes to the general schedule and the associated guidance, particularly if its summary disposition concerns are addressed.

1. Discovery

Regarding the discovery response times, PFS declares the Board's limitation of seven days for interrogatory responses and five days for motion responses is too short to permit ample review of the underlying documents and the preparation of adequate responses and asks that the time limits of fourteen days and ten days provided for in the agency's rules be reinstated.

The Board grants these requests in part, extending the times for filing interrogatory answers to ten days and the time for filing motion responses to seven days. The shortened time for interrogatory responses is predicated on the parties providing requested documents and making their experts and witnesses available for interviews during the

period of informal discovery, resulting in more particularized, focused interrogatories that can be reviewed and answered in a shorter period. Of course, as the Board indicated in its June 29 issuance, the time for filing interrogatory answers can be extended by agreement of the parties involved (so long as the response date is not beyond the discovery cut-off day). A responding party also can ask the Board for further response time for any particular discovery request. By the same token, the shorter discovery motion response time, which takes into account the ten-page limitation on motions, also is subject to individual extension requests as appropriate.

Finally, in response to a PFS discovery comment regarding service of documents accompanying a discovery response or motion, the Board notes that consistent with its earlier guidance on pleading attachments, facsimile transmission should be used when attachments are fifteen pages or less, while overnight delivery is an option in instances when attachments are more voluminous. See Licensing Board Memorandum and Order (Additional Guidance on Service Procedures) (Nov. 19, 1997) at 1-2 (unpublished).

2. Dispositive Motions

In its July 7 filing, PFS suggests an approach to filing summary disposition motions somewhat different from that established by the Board. It declares that rather than

setting page limitations based on all summary disposition motions relating to a particular contention group being filed by a particular deadline, the page limitation should apply for individual contentions based on when a motion regarding any particular contention in the group is filed. PFS proposes a twenty-page limit per contention for any motions filed before the first group cut-off date specified in our June 29 order; fifteen pages for those filed before the second deadline; and ten pages for those meeting the third (and final) due date. There would no limit on the number of contentions for which a party can seek summary disposition by any one of the three deadlines.

We adopt this suggestion, with a modification. To ensure that we are not confronted at the last minute with a plethora of short motions regarding the contentions in any one group, absent leave of the Board a lead party or the staff cannot seek summary disposition during the final filing period on more than three consolidated contentions in that group.

The revised "per consolidated contention" filing restrictions thus are as follows:

Twenty pages: Group I -- Filed forty-five days or more before group final summary disposition motion filing date

Groups II and III -- Filed sixty days or more before group final summary disposition motion filing date

Fifteen pages: Group I -- Filed less than forty-five and more than fifteen days before group final summary disposition motion filing date

Groups II and III -- Filed less than sixty and more than thirty days before group final summary disposition motion filing date

Ten pages: Group I -- Filed fifteen days or less before group final summary disposition motion filing date

Groups II and III -- Filed thirty days or less before group final summary disposition motion filing date

Also regarding dispositive motions, PFS questions whether the established page restrictions would apply to the statement of material facts not in dispute and any other attachments included with a dispositive motion. Those page restrictions do not apply, with one caveat. Absent Board approval, a statement of material facts not at issue, which is required to be filed with each dispositive motion, see 10 C.F.R. § 2.749(a), should not exceed the number of pages permitted for the motion.

Finally, although it was not covered in our June 29 order or party comments on the schedule or the Commission policy statement, equity dictates we apply the same page limitation to responses to a summary disposition motion as are mandated for the motion itself. So too, the required statement of material facts at issue that should accompany any response in opposition to a dispositive motion, see id.,

should not exceed the number of pages permitted for the original motion.

C. Staff Comments on Policy Statement

The staff filed separate comments in connection with the Commission's policy statement indicating that, under the circumstances, the general schedule need not be revised, subject to the caveat that it may seek changes if it finds the schedule is having the effect of delaying its safety or environmental reviews. The staff also declares that while the policy statement provides for the creation of a "case file" for 10 C.F.R. Part 2, Subpart G formal adjudicatory proceedings like that used in Subpart L informal proceedings, establishing such a file would be unnecessarily duplicative in this instance. This is so, the staff asserts, because of the agency's establishment of a local public document room relative to the PFS application and the staff's ongoing efforts to provide the parties with all staff reports and correspondence concerning the PFS facility. Under the circumstances, we agree a case file need not be established in this proceeding.

D. Schedule for Litigation of State Contentions
Security-A, Security-B, and Security-C

One other scheduling matter not discussed by the parties deserves mention here. In LBP-98-17, 48 NRC ____ (Aug. 5, 1998), in response to a State reconsideration request we admitted its contentions Security-A through

Security-C in connection with a purported failure of Tooele County to approve properly a June 1997 cooperative agreement that provides the county sheriff's office with law enforcement authority on the reservation of intervenor Skull Valley Band of Goshute Indians (Skull Valley Band). As with the previously admitted security issue, those contentions are included in the Group I contentions.

II. STATUS OF INFORMAL DISCOVERY

In an August 14, 1998 joint report, the parties advised us that the informal discovery process has been proceeding through the exchange of document requests and/or documents. The applicant and several of the intervenors also have entered into, or in the process of entering into, confidentiality agreements that would permit access to confidential information. No informal interviews have yet been conducted, however.

The status report suggests the applicant has made a significant volume of documents available to the intervenors and the staff and the State intends to respond with more specific document requests. Likewise, the applicant has directed document requests to various intervenors. We encourage the parties to continue this process of document identification and disclosure. We also encourage them to begin the witness interview process. As we have noted

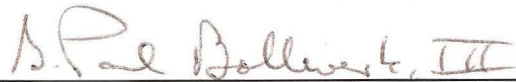
above, if properly utilized, these informal discovery mechanisms should narrow the scope of formal discovery so as to allow for a more focused inquiry during the much briefer period earmarked for that process.

Finally, as part of our continuing efforts to monitor this informal discovery process, we will hold a telephone conference with the parties on either Thursday, October 1, 1998, or Friday, October 2, 1998. Counsel with a conflict that would make him or her unavailable for a telephone conference during all or a portion of either of these two days should advise the Licensing Board Chairman no later

than Friday, August 28, 1998. An order establishing a specific time and date for the conference will be issued thereafter.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD*



G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 20, 1998

* Copies of this memorandum and order were sent this date to counsel for the applicant PFS and to counsel for intervenors Skull Valley Band, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Castle Rock Land and Livestock, L.C./Skull Valley Company, LTD., and the State by Internet e-mail transmission; and to counsel for the staff by e-mail through the agency's wide area network system.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O--ADD'L GEN. SCHEDULE... have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
20 day of August 1998


Office of the Secretary of the Commission