

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:

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

CLERK
ADJL

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

March 29, 1999

RECEIVED MAR 29 1999

MEMORANDUM AND ORDER
(Granting Motion for Additional
Limited Discovery on Group II
and Group III Contentions)

On March 23, 1999, the Licensing Board conducted a teleconference with the parties regarding the status of formal discovery in this proceeding. During the teleconference, intervenor State of Utah (State) proposed revising the existing discovery schedule relative to the safety and environmental contentions that are in Groups II and III. The Board and the parties discussed the State's suggestion and, in response to a Board recommendation, on March 24, 1999, the State filed a motion for a limited discovery window closer to the time those two issue groups are to be tried.

For the reasons set forth below, we adopt the State's suggestion in principal and revise the schedule for Group II

issues, with the caveat that interrogatory use during that period will be circumscribed as outlined below. Any revisions for the Group III issue will await a forthcoming NRC staff status report on scheduling for the ongoing environmental impact statement (EIS) preparation process.

A. As it presently stands, formal discovery against all parties, other than the NRC staff, regarding contentions in Groups I, II, and III is to close on May 28, 1999, with discovery closing dates regarding the staff staggered on a schedule intended to mirror the coalescence of staff positions on the issues in Groups I through III. The State now suggests that for Groups II and III, which respectively contain the balance of the safety issues not found in Group I and the environmental issues, we establish a limited discovery "window" that would allow a period for focused discovery on the issues in these groups at a time closer to the actual hearing dates for those issues. The State also indicated its understanding that although these limited windows for Groups II and III would be during a time when it would have other responsibilities under the present schedule (i.e., the preparation of proposed findings and conclusions following hearings on the Group I and Group II contentions), it was not asking for a delay of any of the other scheduled filing or hearing dates. Based on our discussions with the parties during the prehearing conference and the

representations in the State's March 24 motion, there appears to be no objection to this general concept.

For Group II contentions, which presently are to be heard beginning at the end of July 2000, the State proposed a discovery window from January 1 to February 29, 2000. For Group III issues, which presently are to be heard beginning in April 2001, the State suggested a discovery window of September 1 to November 1, 2000. In connection with the latter revision, however, the staff indicated during the prehearing conference that, as a consequence of the recent application amendment by Private Fuel Storage, L.L.C., (PFS) proposing a more westerly route for a rail spur to bring storage cask shipments into the PFS facility, within the next several weeks it will be providing the Board and the parties with updated status information regarding the EIS preparation process. According to the staff, this report likely will reflect a delay of from two to four months in the preparation of the draft and final EIS documents. The staff suggested, therefore, that the Board delay making any further revisions to the discovery schedule until it has issued its revised status information. Because the State did not want to await this staff information, however, it has asked for Board approval of the Group II changes with the understanding that it (and the other parties) will have an opportunity to comment on any potential changes to the

Group III schedule once the staff's provides its additional EIS status information.

B. The State's proposal, the general terms of which are unopposed, appears reasonable under the circumstances. Although the existing schedule generally was based on the parties' suggestions vis a vis discovery closing dates, see Licensing Board Memorandum and Order (General Schedule for Proceeding and Associated Guidance) (June 29, 1998) at 5 (unpublished) [hereinafter June 29 Issuance], providing a limited discovery opportunity closer to the hearing may well be a useful tool to provide a timely, focused inquiry. The Board thus is willing to endorse this general concept and implement it with respect to the Group II and Group III contentions, with the understanding that the other established filing or hearing dates will not be affected.

Applicant PFS does, however, raise one issue regarding the implementation of this concept that deserves mention. As it was expressed during the prehearing conference and is noted in a footnote to the State's March 24 pleading, PFS suggests that to ensure that this window does not, in fact, encompass the sole discovery effort of a lead party relative to a particular issue, that during the window for each contention a party be allowed to use only five of the total of ten interrogatories per contention it has been allotted

by the Board. See LBP-98-7, 47 NRC 142, 245, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998).

We share the apparent PFS concern that the respective "windows" not become the sole discovery period for contentions in Groups II and III, particularly if a significant number of the allotted ten interrogatories are posed in the late stages of the window period. On the other hand, at least to this point, the parties apparently have been conducting the discovery process in a manner that reflects an understanding it should be used as a tool for gaining information to focus and crystalize the issues to be tried rather than as a weapon in a war of attrition. In the course of informal discovery, the various parties have made available more than fifty thousand documents and have conducted a number of interviews with potential witnesses and others.

As a consequence, we are inclined to provide the parties some latitude relative to the use of allotted interrogatories.¹ We will not impose a requirement that any specific number of the allotted ten interrogatories per contention be utilized before the "window" period. What we will do, however, is provide a sliding scale under which the

¹ In doing so, however, we note that reserving for the "window" period all or a significant number of interrogatories for a contention likely would be a factor weighing against a party's request for additional interrogatories relative to that contention.

failure to utilize the allotted interrogatories in an expeditious manner will result in them becoming unavailable, absent some Board directive to the contrary. Thus, in the case of the Group II contentions, although a party may carry all ten interrogatories for a particular contention into the window period, a failure to utilize at least three of the ten within the first two weeks of the period will cause any of those three unused interrogatories to be lost. Thereafter, failure to utilize an additional three of the seven remaining interrogatories will cause any of those three unused interrogatories to expire.² This would leave no more than four interrogatories for use during the final four-week period of the Group II window. Such a system provides flexibility to the parties while ensuring that these inquiries are not "left to the last minute" so as to put undue pressure on the responding party.³

² On the other hand, if, for example, a party enters the window period with only five interrogatories remaining for a particular contention, then it has only one interrogatory that it must "use or lose" within the first four weeks of the window.

³ As we noted previously, any interrogatories must be posed within a time frame that will allow a timely response before the close of the discovery period. See June 29 Issuance at 7. As also was noted during the prehearing conference, a duty timely to supplement responses is imposed by agency rules. See 10 C.F.R. § 2.740(e).

C. Accordingly, consistent with the discussion above, the general schedule for the Group II contentions is revised as follows:

1. Additional formal discovery regarding any of the Group II contentions may be conducted during the period Monday, January 1, 2000, through Tuesday, February 29, 2000.

2. For each contention in Group II, of the ten interrogatories initially allotted for each of those contentions, absent leave of the Board: (1) no more than seven can be utilized after Friday, January 14, 2000; and (2) no more than four can be utilized after Friday, January 28, 2000.

Further, with regard to the Group III contentions, within seven days of the issuance of the staff status update on EIS-related scheduling, the parties shall have an opportunity to comment on revisions to the Group III schedule relative to an additional discovery "window" or any other relevant matter. Party responses to any other party's comments shall be filed within seven days of the filing of those comments. Thereafter, the Board will issue any further schedule changes as appropriate.⁴

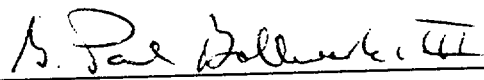
The filings permitted under this memorandum and order should be served on the Board, the Office of the Secretary,

⁴ The Board will issue a new general schedule matrix at the time it makes revisions relative to the Group III contentions.

and counsel for the other participants by facsimile transmission, e-mail, or other means that will ensure receipt by midnight Eastern Time (ET) on the day of filing. See Licensing Board Memorandum and Order (Initial Prehearing Order) (Sept. 23, 1997) at 5-6 (unpublished); Licensing Board Memorandum and Order (Additional Guidance on Service Procedures) (Nov. 19, 1997) (unpublished); Licensing Board Memorandum and Order (Schedule for Telephone Conference and Directives Regarding Expedited Service) (Sept. 2, 1998) at 2-3 (unpublished).

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁵


G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

March 29, 1999

⁵ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) the 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; and (3) the staff.

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NUCLEAR REGULATORY COMMISSION

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(Independent Spent Fuel Storage
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Docket No.(s) 72-22-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing M&O--GRANT'G MOTION..CONTENT'S 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
29 day of March 1999


Office of the Secretary of the Commission