

RAS 5061

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

DOCKETED 12/11/02

SERVED 12/11/02

Before Administrative Judges:

Michael C. Farrar, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

PRIVATE FUEL STORAGE, LLC

(Independent Spent Fuel Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

December 11, 2002

ORDER REGARDING EVIDENTIARY RECORD
AND
TIMING OF DECISION

A. Over the course of the several months since the hearings in this matter were concluded, the parties have filed several joint motions related to the status of the evidentiary record on both the seismic and the aircraft issues. Those motions dealt with the admission of certain Exhibits, the correction of the Transcript, and other similar matters that needed to be resolved before the record could be deemed to correctly reflect the evidence adduced and the Board's rulings thereon, and thus to provide a reliable basis for review by the Commission and by any other appellate tribunals that may eventually become involved. To the same effect, the Board and its staff have also been reviewing for accuracy and completeness the materials in the record prepared by the court reporters.

In response to the parties' motions and in light of our own efforts, it is now appropriate to take or to record the following steps so as to complete the formal preparation of the evidentiary record:

1. On July 31, 2002, counsel for the Applicant filed on behalf of all parties a “Joint Report on Status of Utah Contention L/QQ Exhibits and Other Open Items . . .” that included, in addition to concerns about the seismic Exhibits, concerns about other matters including the court reporter’s binding of pre-filed testimony into the Transcript. In accordance with the requests in that Joint Report, we take or record the following steps:

- The reference on Transcript page 10549, line 4 to Exhibit 86B is deemed changed to 86C.
- The references on Transcript page 10837, lines 2 and 7, to Exhibit III are deemed changed to GGG.
- On Transcript page 12566, the words “admit PFS Exhibit Nos. 241, 242, and 243” are deemed inserted at the end of line 22.
- State Exhibit 197, admitted as a confidential document (Tr. 9781), is replaced by the two documents accompanying the motion: State 197A, which contains all the non-confidential portions of Former Exhibit 197 and which may be made public; and State 197B, which contains the three-page EPRI report summary and is to be treated as confidential.
- The newly-provided PFS Exhibits 247 and 248 (the initial exemption request and the subsequent modification, respectively) are admitted into evidence, as contemplated at Transcript 13522-23 and 13719.
- The tabular listing on page 3 of the July 31, 2002 Joint Report is accepted as identifying all the Exhibits (including those admitted, not admitted, and withdrawn) with proprietary status, which are to be maintained as confidential. Other proprietary documents distributed to the Board and the parties during the course of the proceeding but not made Exhibits are also to be maintained as confidential.

- The Applicant's pre-filed Trudeau-Wissa "Joint Testimony" that was intended to be inserted at Transcript 10834 has since replaced in the official record the "Deposition Transcripts" that had been mistakenly inserted at that point.
- The State's pre-filed Resnikoff testimony on radiation dose consequences and pre-filed Bartlett testimony on design conservatism, intended to be inserted in the Transcript at pages 12349 and 12776, respectively, but mistakenly omitted, have since been bound in the official record at those points.

2. On August 21, 2002, counsel for the Applicant filed on behalf of all parties a "Joint Report on Status of Utah Contention K Exhibits and Other Open Items . . ." that included, in addition to concerns about the aircraft Exhibits, concerns about other matters including the court reporter's binding of pre-filed testimony into the Transcript. In accordance with the requests in that Joint Report, we take or record the following steps:

- PFS Exhibits 79 and 83 are admitted without objection.
- State Exhibits 151, 154, and 157 are admitted without objection.
- PFS Exhibit QQQ, to which the State objected and which was in effect superseded by later, more complete documents (and to which no party referred in its post-trial briefs) is not admitted.
- PFS Exhibit 102 is admitted over the State's objection.
- PFS Exhibits WWW, XXX, YYY, and ZZZ are e-mail accounts of pilot action. Those accounts that were submitted directly by the pilot (XXX and the second portion of YYY) are admitted notwithstanding their hearsay character and notwithstanding the Board's suggestion during the trial that in some instances pilots testify in person rather than through hearsay accounts; those accounts that involve indirect reports by persons other than the pilot involved (WWW, the first portion of YYY, and ZZZ) are not admitted.

- State Exhibit 224 is admitted in order that excerpts from all the relevant manuals will be before the Board. See footnote 1 on page 3 of the Joint report. (In light of the first full sentence on page 3 of the Joint Report, the Board would entertain a motion for reconsideration of this ruling, but such a motion would need to be extraordinarily well-founded in order for the Board to depart from the principles concerning the admissibility of evidence it attempted to apply in a consistent manner throughout the proceeding.)
- The additional changes and deletions made by the Applicant to PFS Exhibit O, in order to complete its implementation of prior Board rulings, are accepted; the replacement pages have been placed in the official record.
- The applicant's pre-filed Cole/Jefferson/Fly testimony (and the summary identifying the principal witness responsible for each answer), pre-filed Vigeant testimony, and pre-filed Johns testimony, intended to be inserted in the Transcript at pages 3061, 3090, and 3206, respectively, but mistakenly omitted, have since been bound in the official record at those points.
- The State's pre-filed Horstman testimony, intended to be inserted in the Transcript at page 4214 but mistakenly omitted, has since been bound in the official record at that point.
- The Staff's pre-filed Campe/Ghosh testimony, intended to be inserted in the Transcript at pages 4078 but mistakenly omitted, has since been bound in the official record at that point.
- The State's July 1, 2002 cross-examination of the Applicant's rebuttal witnesses, mistakenly omitted from the Transcript beginning at page 13113, has since been provided and included in an amended official Transcript.

- The material on jettisoned ordnance consequences referred to in the last two paragraphs of the Joint Report (pages 5-6) is stricken, in keeping with the thrust of the Board's ruling on the in limine motions and the position of the Staff and the State as recounted in the Joint Report. Specifically, the stricken material includes the following items: the second paragraph (except for the first two sentences) on page 112 of the Cole/Jefferson/Fly testimony; the corresponding material on page 38 of PFS Exhibit O; State Exhibits 62 and 63; and Question and Answer 74 of the Horstman testimony.

3. The parties filed on December 4, 2002 Proposed Joint Corrections to the Transcript of testimony on Contention Utah K, dealing with aircraft issues. The parties represented therein that "given the size of the transcript, the parties have not attempted to undertake a comprehensive identification and listing of every potential correction to the transcript," going on to explain that they "have not sought to identify and correct obvious typographical or spelling errors." They further represented that they were "aware of no contested issue of fact whose resolution turns on a proposed correction to the transcript." On those understandings, the proffered corrections are accepted and the Transcript is deemed revised accordingly.

4. The parties filed on December 6, 2002 Proposed Joint Corrections to the Transcript of testimony on Contention Utah L/QQ, dealing with seismic issues. The parties made essentially the same representations therein that they did on the aircraft transcript, reflected in ¶ 3, above. On that understanding, the proffered corrections are accepted and the Transcript is deemed revised accordingly.

B. We believe that the above steps allow for the formal closing of the evidentiary record in appropriate fashion. But given the volume and complexity of the record, and the many external and internal organizations involved in creating, transmitting and filing that record, if it

appears that additional measures must be taken, or controversies resolved, to put the record in a proper state, the parties should bring those matters to our attention. For instance, if the manner in which the Transcript recorded the Board's countless questions, comments and rulings over the course of the nine-week hearing becomes both in dispute and of significance, the parties can seek the Board's help to resolve the matter. In that regard, the Board wishes again to compliment counsel for all the parties for the many ways in which they were able to work cooperatively during the course of the proceeding to agree upon or otherwise to resolve procedural matters and thus to keep those matters from consuming time and effort better devoted to substantive issues.

C. The post-trial briefing schedule established at the conclusion of the hearing was later slightly altered (at the request of the State in one instance and the NRC Staff in another), such that the last briefs were received on October 16 rather than on the originally-contemplated October 7. (In that regard, the three parties' opening and reply briefs on the two safety issues before us total over 2,000 pages;¹ the earlier briefs on the environmental issue involving rail-line alternatives were considerably shorter.) As the parties are aware, the Commission has urged Presiding Officers, as a general matter, to render decisions within 60 days of the filing of the last briefs in a proceeding.² Under that timetable, the Board's decision would have been expected by mid-December, 2002.

¹ The average length of those twelve briefs was just under 170 pages. The longest was the Applicant PFS's 337-page opening brief on seismic issues; the shortest was the State's 57-page reply brief on aircraft issues.

² Specifically, in its Statement of Policy on Conduct of Adjudicatory Proceedings (CLI-98-12, 48 NRC 18, 20-21 (1998)), the Commission, after noting that throughout the proceeding schedules for prompt decisions should give "due regard to the complexity of the contested issues and the interests of the parties," went on to "strongly encourag[e] presiding officers to issue decisions within 60 days after the parties file the last pleadings"

Although decision drafting has been proceeding at a considered pace, and has been conducted with the Commission's guideline in mind, it has become apparent that the mid-December target is unattainable, given the bulk, complexity and significance of the case. To allow the parties to plan their year-end staffing needs, they are advised that a decision will not be issued before mid to late January, 2003.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Rockville, Maryland
December 11, 2002

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER REGARDING EVIDENTIARY RECORD AND TIMING OF DECISION 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 11th day of December 2002