

RAS 6787

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

DOCKETED 09/09/03

SERVED 09/09/03

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

September 9, 2003

SCHEDULING ORDER AND REPORT

On August 20, the Board held with the parties the third scheduling conference call in a little over three weeks in this proceeding, which involves the issue of the consequences of potential accidental crashes of military aircraft into the spent nuclear fuel storage facility proposed by the Applicant PFS. During that call, we were able to conclude all discussions necessary to the scheduling of the remaining hearing-related activities.

In this Order (whose issuance was necessarily delayed by the Chairman's absence on vacation [see Tr. 14198] and his attention to another proceeding), we set out the final schedule that resulted from those discussions. Because that schedule does not comport with the expectations of a year-end Board decision that the Commission expressed at the end of May, we also report -- at some length and at the risk of some repetition of what we set out in two prior scheduling reports intended for the Commission's benefit (issued July 31 and August 15, regarding conference calls of July 28 and August 12, respectively) -- on the factors that have since arisen and driven the formation of that schedule.¹

¹ Previous scheduling conferences were held on May 29 (in person) and June 25 (by phone). Transcripts were prepared but no written orders were issued at that point.

As will be seen and was discussed with the parties on August 20, the schedule we now adopt is, in our judgment, not only an appropriate one but the one that moves forward as aggressively as possible while (1) preserving the parties' right to prepare their cases adequately and (2) generating a record that will allow a sound resolution of this important safety issue, which the Applicant's filings have already demonstrated to be a complicated one.

The upshot is that, after the prehearing activities which we will detail herein are completed, the hearing itself will begin the week after Thanksgiving, on Tuesday, December 2, and is anticipated to conclude no later than Friday, December 19. With our decision today that the parties' simultaneous initial post-hearing filings will be due on January 23 and their simultaneous reply filings due on February 13, the normal 60-day period for the Board's decision would expire in mid-April, 2004.

1. Before detailing the key reasoning driving, and the interim dates comprising, that schedule, we should note that even under the Applicant's view that the prehearing and post-hearing phases could be truncated from what we have adopted, the Board's decision could not have been expected before the end of February, 2004 (see, e.g., Tr. 14168-69). In other words, the difference between the scheduling views of the Applicant, on the one hand, and the NRC Staff, the State and the Board on the other, amounts to six weeks at most, and perhaps less (compare Tr. 14196-97 and fn. 19, below). We do not consider this untoward to assure that fairness is achieved, due process is not denied, and a sound decision on an important safety issue is reached.

There are essentially three factors, all of which have become apparent subsequent to the Commission's May 28 announcement of its expectations (CLI-03-05, 57 NRC 279, 284-85), that have slowed the scheduling process: (1) the issue is proving more complicated than anticipated, as first evidenced by the Applicant's taking 75% longer than expected to file the more numerous than expected expert reports documenting its position (see Tr. 13891-92,

13928, 14004-05, 14042); (2) there has been a need to allow time for the very thorough Requests for Additional Information (RAIs) which the NRC Staff found it necessary to propound in order for it to carry out its regulatory role, and the answers to which require additional analyses from the Applicant (see, e.g., Tr. 14068-69); and (3) there has been introduced into the case a large amount of “safeguards” material, which in any proceeding will create significant logistical slowdowns, stemming from restrictions on counsel’s ability to communicate with experts in different locations to develop a comprehensive presentation (see Tr. 13902, 13942, 13944-51, 13957, 13980).²

2. To the extent workable in the circumstances of this case, the Board and the parties explored and utilized the procedural techniques which the Commission urged upon us, as well as others intended to let the parties develop in a fair manner a sound, comprehensive, and comprehensible record that will lead to a decision with similar characteristics. We discuss these techniques below (pp. 8-11).

Before turning to those details, we set out two other matters upon which the parties differed and which the Board had to resolve to determine the schedule. These involve (1) the projected length of the hearing itself and (2) the number of tasks counsel can be fairly expected to handle simultaneously before the burden becomes unreasonable and unfair, and prevents a party from producing a record that does justice to its safety case. A deficient record on a safety issue is in no one’s interest.

As to the length of the hearing, the Board found instructive its 2002 hearing experience, where the parties concurred in a Salt Lake hearing schedule before informing the Board of the number of witnesses involved. That schedule proved unachievable, and we determined at the

² Before these factors became apparent, we had during our first two prehearing conferences (May 29 and June 25) started a scheduling process that would have led to a year-end Board decision. See also “Joint Report on Proposed Schedule” dated June 19.

outset here not to set a hearing length prior to knowing how many witnesses the parties intended to present (Tr. 13889-90, 13912-13, 13929, 13981-82). At different points, the parties indicated that the consequences hearing would involve 20 to 25 witnesses (Tr. 14058-59), with the Applicant variously described as having five or six, eight, or ten (Tr. 13929, 14062, 14186) and the State and Staff also within that range (Tr. 14186). See also fn. 8, below.

In the 2002 hearings, we found that it took an average of one hearing day for each witness³, including most witnesses' re-appearance to provide rebuttal to another party's witnesses. Even anticipating some efficiency gains based on that experience (Tr. 13983-84), and even adopting a particular pre-hearing technique and a hearing format that should also promote efficiency (see Tr. 13913-15, 14122-24, relating to combining different aspects of a witness' testimony into his initial appearance), the Board 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. The Board instead insisted that, even if some witnesses are grouped in panels, as has been discussed (see Tr. 13987-88), we needed to allocate almost three weeks (14 days) to the hearing.

As to the burden on counsel, the NRC Staff objected strongly (Tr. 14164-66) to the Applicant's urging that, within a several-week period, the Staff could (1) analyze the Applicant's RAI responses; (2) be involved in depositions; (3) prepare its written evaluation of the Applicant's case; and (4) prepare its pre-filed testimony. For its part, the State voiced similar concerns about this burden, stressing the logistical problems -- and therefore the time inefficiencies -- presented by having to work around necessary "safeguards" protective measures.

³ In most instances, the 2002 witnesses appeared individually. More extensive use of witness panels is contemplated in the upcoming consequences hearing.

Even were we to discount these concerns, we cannot ignore our prior experience in the case, our recent review of the Applicant's expert reports, and our current understanding of the complexity of the pending RAIs.⁴ All these make us entirely unwilling to place on counsel an undue and insurmountable burden that will inevitably produce shoddy work and procedural unfairness.

3. During the most recent conference call, having taken all those factors into account, we made rulings on disputed points that enabled the parties to produce the next week a specific schedule which effectuated those rulings,⁵ as follows:

⁴ RAI responses were filed shortly before this Order was issued (see fn. 7, below), generally in accord with the schedule we adopted -- but not by the week-earlier date (August 29) the Applicant had originally targeted for itself (Tr. 14088-89, 14139, 14149; August 15 Order, p. 2). Any doubts about the complexity of the case should be removed by the quantity and detail of the Applicant's submittal of these lengthy answers to questions the Staff raised about its initial presentation.

⁵ Again, we commend the parties for working together, within the framework we established on the most recent conference call, to agree on scheduling details that accommodated special concerns and needs. See Tr. 14198-99, 14202-03. Their agreement (within the framework we set) extended through the hearing dates; the post-hearing filing date options were argued during the call, leading to us deciding herein on the post-hearing schedule.

Milestone	Date⁶
PFS Response to Staff's RAIs	September 4 (Thursday) ⁷
Identification of Witnesses	September 5 (Friday) ⁸
State Expert Reports	September 18 (Thursday)
Staff's Written Evaluation	September 30 (Tuesday) ⁹
Expert Depositions in Utah	October 1-10
Expert Depositions in Utah or Washington, DC	October 13-17
Expert Depositions in Washington, DC	October 20-24
Simultaneous Pre-Filed Testimony	November 8 (Saturday)
Motions in Limine	November 18 (Tuesday)
Responses to Motions in Limine	November 25 (Tuesday)
Oral Argument and Ruling on Motions in Limine	December 2 (Tuesday)
Hearing	December 2 - December 19
Simultaneous Opening Proposed Findings/Conclusions	January 23, 2004
Simultaneous Reply Proposed Findings/Conclusions	February 13, 2004
Licensing Board Decision	April 13, 2004

As can be seen, that schedule gives the State two weeks after receipt of the last portion of the Applicant's presentation to file its expert reports, while the Staff gets the 3½ to 4 weeks it said it

⁶ Due dates are filing (i.e., service) dates. Service of documents containing Safeguards Information is to be accomplished such that receipt is no later than the next business day.

⁷ The vast majority (29 of 31) of the Applicant's RAI responses were in fact sent to the State on this date and received by the State, the Staff and the Board on Friday, September 5. The remaining material was available the next day.

⁸ The parties in fact met the date for this milestone. As it turned out, the Staff listed 11 possible witnesses, the Applicant seven, and the State seven.

⁹ This date assumes no additional RAIs are required and an adequate PFS response.

needed to analyze those RAI responses (Tr. 14153-54). Much of the month of October then is committed to the deposition of witnesses, at a rate of better than one per business day. All parties' pre-filed testimony is then due two weeks later. [In Judge Kline's absence (see p. 12, below), mid-November's final trial preparation efforts can in part be dedicated to the preparation, at a time and in a format yet to be determined, of an expanded version of the advance "Key Determinations" we found so useful in the 2002 hearings (see Tr. 13890, 13982, 14002, 14203-04).]

During the August 20 conference, we entertained the parties' differing arguments as to how long was needed for post-hearing filings, given all parties' concurrence that some allowance had to be made for the year-end holidays. As is evident, our ruling today has the parties filing simultaneous opening Proposed Findings of Fact and Conclusions of Law on January 23, 2004, and simultaneous replies on February 13, 2004.¹⁰ With the hearing ending on Friday, December 19, these time periods are in keeping with standard practice in agency proceedings; we find it inappropriate to reduce those times, as the Applicant would have us do, given the complexity of this matter.¹¹ Again, under the normal 60-day rule, this would yield a Board decision in mid-April, which should prove a more achievable target than those set following the 2002 hearings (see fn. 10, last sentence).

¹⁰ At the close of the hearing, we will impose an appropriate page limit on those filings, so as to have the parties focus on those determinations that are truly key to our evaluation of the evidence (see Tr. 13915, 13997-98). At the outset (May 29), we indicated that we expect to observe similar limits in, and impose similar discipline upon, our decision-writing, yielding a shorter, faster result. See Tr. 13912.

¹¹ See also Tr. 14000-01, reflecting the Staff's view that the Applicant's post-hearing briefing schedule was "much too ambitious" and not "something that can be done."

4. In settling on the above schedule, we considered, at various junctures during our string of prehearing conference calls, the applicability of various measures, including those suggested by the Commission on May 28 (see CLI-03-05, 57 NRC at 284-85), that might shorten the decisional timeframe (see July 31 Order, p. 3, and Tr. 14092¹²). We discuss each of these below.

a. Foregoing a Formal Staff Evaluation. The Staff's approach to review of the Applicant's presentation does forego a formal evaluation (see Tr. 13878). We note that such an evaluation proved critical to the evidentiary record that resulted in our upholding the Applicant/Staff position on one aspect of the seismic issues.¹³ Despite that fact, the Staff, rather than take the time to undertake such an independent review of the current issue, is simply evaluating and analyzing the Applicant's position, through its normal internal review process, which in this instance involves extensive RAIs. The Staff's informal evaluation will be reflected in a report that will serve as the foundation for its pre-filed testimony. See Tr. 14092-95.

b. Precluding Summary Disposition Motions. Implicit in all the prehearing discussion so far was the belief that the issues to be presented would generally not lend themselves to summary disposition (Tr. 13919-20). The possibility that the State might file a motion for partial summary disposition on an overarching mixed question of law and fact¹⁴ and seek a pre-trial ruling thereon was discussed but then abandoned (Tr. 14029, 14032-33, 14071-75, 14095-98).

¹² The frequent transcript references to "extra reports" should, of course, be read as "expert reports." Other transcript inaccuracies can similarly be correctly interpreted in context.

¹³ See LBP-03-08, 57 NRC 293, 352, and Tr. 14093-94.

¹⁴ The State believes that a major thrust of the Applicant's approach to the upcoming "consequences" issue is inconsistent with our decision in the prior "probability" phase. It was eventually agreed that this matter can best be resolved as part of our eventual post-hearing decision.

The Applicant foreswore filing any summary disposition motion (Tr. 14098). Accordingly, the schedule makes no allowance for any such filings.

c. Selecting Hearing Location. Once it became apparent that much of the hearing would have to deal with documents and testimony containing “safeguards” information, it became equally clear that the hearing would have to be closed to the public. That being so, and because of the additional difficulty of protecting safeguards documents in hotel meeting space, there was little reason to return to the Salt Lake area for the hearing, and it will in fact be held at NRC Headquarters. Tr. 14098-99.

d. Limiting Number of Witnesses. With the Applicant having invested so much in the proceeding so far, and with it being the party financially most affected by delay, there seemed to be no legitimate purpose served in limiting the number of witnesses PFS believes it needs to present to prevail on this last remaining safety issue. It was believed at one point that the Applicant would present its case through as many as 10 witnesses (Tr. 14186). That being so, it was inappropriate at these preliminary stages -- before witnesses were identified -- to tell the State and the NRC Staff that their plan to proceed through 6 or 7 witnesses each (Tr. 14186) was excessive. The Board set the number of hearing days accordingly. Tr. 14101-08, 14196-97.¹⁵

Of course, as witnesses are identified and deposed and as their testimony takes shape, there may prove to be uncontested subissues that will make it possible to arrive at stipulated testimony or facts that will save hearing time. The more time the parties have to prepare, the more likely it is this will occur; in fact, in setting a 14-day hearing schedule for some 20-25 witnesses, the Board is counting in part not only the time savings generated by greater use of

¹⁵ Now that witnesses have been identified (see fn. 8, above), we will look anew at whether the number who need to testify live might be reduced.

panel presentations but also on the parties' ability to generate such stipulations, as well as on a new format for presenting a witness' rebuttal testimony (referred to above, p. 4).

e. Making Simultaneous Submissions. The hearing schedule is built on the view that the Applicant must file its presentation first so that the other parties know to what they are called upon to respond (Tr. 14110). And the public interest is served by having the Staff's subsequent review and analysis of the Applicant's position reflected in a single, comprehensive document (Tr. 14110). On the other hand, it was recognized that time could be saved if the State were given the opportunity to file its expert reports in possibly incomplete fashion with the right to supplement them later through its pre-filed testimony (compare Tr. 13903 and 13905-07 with Tr. 14108-15). This approach is reflected in the schedule, which has the State filing its initial position before the NRC Staff does.

The parties' original presentations are thus to be filed in sequence (albeit with some simultaneity in the respective preparation periods). Beginning with the pre-filed testimony, however, all parties will be filing simultaneously.

f. Foregoing or Limiting Discovery. Given that one of the original purposes of discovery was to inform a litigant of the nature of his opponent's case before trial, the Board inquired specifically of the parties why that purpose was not served by the pre-filing of testimony, so that depositions for the purpose of "discovery" could be omitted (Tr. 14115-17)¹⁶. All the parties responded that other, legitimate purposes were served by depositions, and that conducting such depositions would enable them to sharpen their presentations and focus their cross-examination at trial, thus providing for a more concise record and a shorter hearing. With no party favoring this suggestion, the Board did not pursue it further. Tr. 14117-22.

¹⁶ Documents are generally being informally disclosed and exchanged, eliminating the need for formal discovery as to them (Tr. 13888-89).

g. Timing of, and Need for, in limine Motions and Responses. Under the schedule proposed by the Applicant, in limine motions would have had to be filed shortly before the hearing and would have been argued at the beginning of the hearing, with no opportunity before argument for parties to file, or the Board to examine, written responses to the motion. In this regard, the Board stressed the limited role that it believed such motions should play in any event, and indicated that in the few instances such motions might be meritorious, the grounds therefor would likely be known in advance and could be filed earlier (Tr. 13990-91, 14126). In any event, a method was determined for obtaining responses on the eve of trial, or (for later-appearing witnesses) deferring resolution until part-way through the hearing, and a common understanding was reached as to how these matters could be handled without causing delay. Tr. 14124-28. But under the less-aggressive schedule now adopted, this problem is mooted.

With the parties and the Board having thus given serious consideration to the suggestions from the Commission and other sources as to how to conduct the proceeding efficiently, and having adopted those suggestions that appropriately served that purpose, it was nevertheless infeasible to achieve the Commission's expressed preference for a year-end decision.¹⁷ Again, that result obtained because the scheduling of the consequences proceeding has been retarded by (1) the previously-mentioned and fully-justified inability of the Applicant to meet its commitment to file its expert reports by June 30 (see July 31 Order, pp. 1-2); (2) the Staff's RAI process, which seeks additional information from the Applicant to enable the Staff to make a judgment about the legitimacy of the Applicant's position and which may yet involve a second round of requests (Tr. 14140-41); and (3) the logistical delays occasioned by the introduction of safeguards material. In that regard, to help deal with these complexities, the

¹⁷ That this would be the result was projected in both our July 31 Order (p. 3) and our August 15 Order (p. 4).

State has brought on additional counsel from the private sector to assist in its preparation of the case (while assuring us that including those counsel will not engender any “start-up” delays) (Tr. 14141-42).¹⁸

5. In establishing a schedule, the Board did have to work around one conflict. That was the long-planned absence of Judge Kline from the country for a little over two weeks in November (November 7th-22nd). That absence would not have interfered with the “year-end-decision” schedule we were pursuing before the case’s complexities became apparent.

When it became apparent the initial schedule was too truncated and that Judge Kline’s period of absence would play a part in setting a revised schedule (see Tr. 14042), we twice offered the parties the option of seeking to have the Board reconstituted with a replacement for Judge Kline. Both times, the parties rejected that approach (Tr. 14042, 14044, 14049, and Tr. 14183-84).

The Applicant did suggest -- in proposing an earlier hearing date -- that, rather than await Judge Kline’s return to reconvene, the Board simply proceed without him during his absence. We rejected that suggestion. While we are prepared to proceed under the quorum rule for a brief period, we think it imprudent in this instance to do so for longer spells. As to a lengthy absence, we have no doubt that Judge Kline could return and, upon review of the record, fully comprehend what had taken place. But his capability thus to “catch up” is not the issue. Rather, the Board is concerned that in the upcoming proceeding his absence would retard the development of the record. His presence is needed to help us explore, through contemporaneous questioning of witnesses, any inconsistencies or deficiencies in the evidence as it is being presented. Given the known complexity of the matter before the Board, and the need to avoid any delay that might be occasioned by having to recall witnesses, in this instance

¹⁸ In line 6 of Tr. 14142, the word “him” is inaccurate -- the word spoken, or at least intended, was “myself.”

the unavailability of one judge to join with his colleagues in thus developing the record cannot be remedied adequately simply by having the record thus-produced available for all judges to read. The risk of an undeveloped record on a safety issue of this nature and complexity is not worth taking.

This is particularly so here because, as it turned out, Judge Kline's absence meshes with the schedule we adopted, so long as we prove correct in rejecting the Applicant's notion that the hearing can be completed in two weeks.¹⁹ The additional pre-hearing time we have deemed essential for the parties to conduct their pre-hearing activities puts to good use the time Judge Kline is unavailable.

In sum, the Board was faced with two alternatives. We could have adopted, over the State's and the NRC Staff's strong objection, the Applicant's extremely aggressive, seemingly unrealistic schedule in the knowledge that, as the proceeding progressed, we almost certainly would have to enter extension orders, which would ultimately -- but in stutter-step, disruptive fashion -- put us on the same schedule we adopt today.

¹⁹ More specifically, the Applicant pressed for a truncated prehearing period that would, in the Applicant's view, have allowed us to start a two-week hearing in late October and thus complete it in early November, just as Judge Kline was leaving. If, however, that hearing took the three weeks we project, it would have had to reconvene the first week in December, and would have thus not have been completed until December 5, only two weeks before its now-scheduled completion date. The schedule we have now adopted, building in Judge Kline's absence, provides the parties a much-needed five weeks more than the Applicant would allow them to complete all prehearing preparations, while delaying the hearing's completion date only two weeks.

We rejected that course. Rather, we have -- based on our individual and collective familiarity and experience with this and other complex litigation, and taking into account from the outset²⁰ the timeliness and fairness guidance offered by the Commission regarding this proceeding -- adopted a realistic schedule which preserves the parties' right to fairness and promotes a comprehensive record, all to the end of yielding a comprehensible and supportable decision.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

By Michael C. Farrar, Chairman*
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 9, 2003

* Although I am issuing this procedural order over only my own signature, as authorized to do, my two colleagues on the Board wish it known that they fully endorsed the schedule that we set, for the reasons we expressed during the series of conferences and have summarized here.

Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) intervenor State of Utah; and (3) the NRC Staff.

²⁰ See Tr. 13900-01, 13910-12, 13915-16, 14009-10.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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 SCHEDULING ORDER AND REPORT 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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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of September 2003