

Official Transcript of Proceedings
NUCLEAR REGULATORY COMMISSION

Title: Private Fuel Storage, LLC

Docket Number: 72-22-ISFSI

DOCKETED
USNRC

March 1, 2004 (10:17AM)

Location: Rockville, Maryland

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Date: Tuesday, February 24, 2004

Work Order No.: NRC-1330

Pages 14500-14580

NEAL R. GROSS AND CO., INC.
Court Reporters and Transcribers
1323 Rhode Island Avenue, N.W.
Washington, D.C. 20005
(202) 234-4433

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

+ + + + +

ATOMIC SAFETY AND LICENSING BOARD
CONFERENCE

-----X

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

-----X

Nuclear Regulatory Commission
Eighth Floor Conference Room
Two White Flint North
11545 Rockville Pike
Rockville, Maryland

Tuesday, February 24, 2004

The above-entitled matter came on for
hearing at 1:00 p.m.

BEFORE:

MICHAEL C. FARRAR	Chairman
PAUL B. ABRAMSON	Administrative Judge
PETER S. LAM	Administrative Judge

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 APPEARANCES:

2 On Behalf of the Licensee:

3 PAUL A. GAUKLER, ESQ.

4 D. SEAN BARNETT, ESQ.

5 of: Shaw, Pittman

6 2300 N Street, N.W.

7 Washington, D.C. 20037-1128

8 (202) 663-8304

9 (202) 663-8063

10
11 On Behalf of the Intervenor, the State of Utah:

12 JAMES SOPER, ESQ.

13 JEAN BRAXTON, ESQ.

14 DENISE CHANCELLOR, ESQ.

15 CONNIE NAKAHARA

16 of: Utah Attorney General's Office

17 160 East 300 South

18 5th Floor

19 P.O. Box 149873

20 Salt Lake City, Utah 84114

21 (801) 366-0286

22 (801) 366-0292 fax

1 On Behalf of the Nuclear Regulatory Commission:

2 SHERWIN E. TURK, ESQ.

3 LAURA C. ZACCARI, ESQ.

4 of: Office of the General Counsel

5 U.S. Nuclear Regulatory Commission

6 Washington, D.C. 20555-0001

7 (301) 415-1533

8 (301) 415-3725

9
10 ALSO PRESENT:

11 Gordon S. Bjorkman

12 Mark S. Delligatti

13 Jack Guttman

14 Susan Lin

15 Sharon Perrini

16 Mahendra J. Shah

17 Robert E. Shewmaker

18

19

20

21

22

23

24

25

P-R-O-C-E-E-D-I-N-G-S

(4:24 p.m.)

JUDGE FARRAR: All right. We're back on the record a little after 4:20 on Tuesday, February 24th. We have just completed three hours of discussion about the admissibility of the recently filed State Contention TT. We did that under safeguards on a secure-line, secure space, safeguards-protected, and we -- at the end of that discussion we deferred our decision on the contention while the parties discussed their respective positions with each other.

We'll now move into the -- and again, we're on an unsecure-line now because we will just be talking about scheduling of the proceeding, which does not deal with any safeguards-protected matters.

Have the parties had a chance to talk to each other about the schedule?

MR. GAUKLER: Yes, we have, Your Honor. I can't say we necessarily agreed upon a schedule, but we have had a chance to talk about the schedule.

JUDGE FARRAR: All right. Would it help us to know -- well, I will let you know that my colleagues and I have talked about a schedule, and we have -- if you all have not agreed on one, we have one

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 we will throw out there at the appropriate time. Do
2 we have any word yet on when the staff will complete
3 its review?

4 MR. TURK: Yes. And with respect to the
5 complete review, we're looking to get you a report by
6 April 20th that would be inclusive of all matters
7 under staff's review. We're hoping to get the
8 aircraft portion out, and by aircraft I mean angles
9 and speeds. We're hoping to get that out sooner, but
10 I can't give you a precise date yet. I'm still
11 waiting to see the draft report, but if possible, I'd
12 like to get that to PFS and the State by mid-March.
13 That's my goal. I'll know in the next week if we can
14 do that or not.

15 JUDGE ABRAMSON: We appreciate your
16 efforts, Mr. Turk, to try to meet that schedule.

17 MR. TURK: Thank you. We do have a lot of
18 different pieces that go into the report, which is why
19 it takes more time than it might otherwise be. We are
20 waiting for Sandia's report to us. We're doing an
21 evaluation of both the cask and the CTB. We have the
22 aircraft angles and speeds component, and we're
23 looking at the State's report, so we do have a lot of
24 different pieces to fit together. So we do think it
25 will take us that long to get the complete work to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealgross.com

1 you.

2 JUDGE FARRAR: We had in our discussions
3 yesterday -- Mr. Gaukler, you had mentioned something
4 about Fourth of July. You don't know if you wanted it
5 done by then, and I think you said done.

6 MR. GAUKLER: I said done.

7 JUDGE FARRAR: Some thought you had said
8 started, but we didn't think that was the case. We
9 had hoped that we could have had the stamped document
10 by April 5th. We had come up with a schedule that
11 would have allowed us to use the Fourth of July
12 weekend as a break, two weeks before then, two weeks
13 after that, let everybody take a five -- and
14 particularly the State people go back home over a five
15 day Fourth of July weekend.

16 Mr. Turk, I'll ask the question. I take
17 it there's no way that April 20th could be moved up to
18 April 5th.

19 MR. TURK: As much as I would like to, I
20 don't see that being a possibility. And my reason is
21 again, we have not yet received the Sandia report, so
22 we haven't even begun to work with that, let alone we
23 haven't finished our other analysis.

24 JUDGE FARRAR: Let's hold on a second.
25 I'm looking for a document here.

1 MR. GAUKLER: I have a copy of the old
2 schedule, a couple of drafts I had put together.

3 JUDGE FARRAR: Yes. All I was looking for
4 was the period - not the dates, but the periods we had
5 allowed for various things, which I can go without it.

6 MS. CHANCELLOR: If I may, Your Honor, I
7 asked Ms. Perrini to distribute a document. I thought
8 it would be helpful if you had a list of the potential
9 witnesses and panels that we know of now that will be
10 involved in the hearing. And I'm wondering if that's
11 being handed out.

12 JUDGE FARRAR: Yes. This is from -- okay.

13 MS. CHANCELLOR: In a table format. It's
14 got issues.

15 JUDGE FARRAR: Oh, great. Thank you.
16 That's just be handed to us.

17 MS. CHANCELLOR: I think it's hard to
18 discuss the schedule without knowing how many
19 witnesses there are.

20 JUDGE FARRAR: Right.

21 MR. TURK: I believe we have only one
22 sheet, but it's the wrong sheet. Denise, they've just
23 passed out your list of potential witnesses for each
24 party. Is that the one you meant?

25 MS. CHANCELLOR: Yes, that's it, Sherwin.

1 MR. GAUKLER: Okay. Because I have a
2 draft of the old schedule, plus a couple of suggested
3 schedules I discussed with the State and the Staff
4 with no agreement on that.

5 JUDGE FARRAR: Okay.

6 MR. GAUKLER: Let me just hand that out
7 for your information.

8 JUDGE FARRAR: Okay.

9 MR. GAUKLER: It has the old schedule on
10 the last --

11 JUDGE FARRAR: Oh, good.

12 MR. GAUKLER: That gives you the --

13 JUDGE FARRAR: The intervals.

14 MR. GAUKLER: Right.

15 MS. CHANCELLOR: Paul, is this the
16 schedule that you e-mailed yesterday?

17 MR. GAUKLER: Yes, same thing I e-mailed
18 to you yesterday.

19 MR. TURK: Actually, Your Honor, I have
20 something that might be more useful, but I only have
21 one copy. I'll have to run or ask someone to get
22 copies. I've laid out the Board's order of September
23 9th, 2003 with the milestones in numerical values, and
24 I've put in new dates assuming an April 20th staff
25 report. I can get copies of that made for you.

1 JUDGE FARRAR: Get that while -- the State
2 doesn't have it.

3 MR. TURK: The State and PFS have it.

4 JUDGE FARRAR: Oh, good.

5 MR. TURK: We had previous e-mail
6 transmissions on it. It does have some dates in it
7 that they don't have yet, and those are the draft
8 dates going to me or other people in NRC staff, so I'd
9 ask you to disregard those, and just look at the
10 hearing dates.

11 JUDGE FARRAR: Right. And that will give
12 me the --

13 MS. CHANCELLOR: We don't have a copy of
14 that.

15 MR. TURK: I've e-mailed it to you
16 approximately 10 days ago. If you're near a computer
17 you might pick it up, or I can just read the dates on
18 the record.

19 MS. CHANCELLOR: No, I didn't get anything
20 10 days ago, Sherwin. Can you just fax it to us?

21 MR. TURK: We can do that.

22 MS. CHANCELLOR: (801) 366-0292.

23 JUDGE FARRAR: Do that again.

24 MS. CHANCELLOR: 366-0292, area code 801.

25 MR. TURK: We're getting a copy made right

1 now, Denise. And as soon as we do that, we'll try to
2 get you a fax.

3 JUDGE FARRAR: All right. While we're
4 doing that, let's look at the witnesses. Ms.
5 Chancellor, you did this document?

6 MS. CHANCELLOR: Yes, I did, Your Honor.
7 I did it after I had a conference call with Mr.
8 Gaukler and Mr. Turk about the schedule and the
9 witnesses that each party would have. And Mr. Gaukler
10 hasn't seen this because he'd already left his office
11 when I e-mailed it. I believe Mr. Turk has saw it an
12 hour or two before today's conference.

13 JUDGE FARRAR: All right. To help us get
14 started, would you or someone just go down the issues
15 and give me ten words on what each of those issues
16 means? The speed and angle means, that's the portions
17 of the crashes that the applicant is trying to exclude
18 on the grounds that they're a speed and angle that
19 would not penetrate the cask.

20 MR. BARNETT: Your Honor, that's the
21 characterization of the distribution of speed and
22 angles one would expect.

23 JUDGE FARRAR: Characterization of the
24 distribution.

25 MR. BARNETT: Yes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE FARRAR: Okay.

2 MR. TURK: And as I understand that issue,
3 that would only address the historic record of F-16
4 crashes. How many crash at one speed versus another
5 speed.

6 MS. CHANCELLOR: That's not the scope of
7 Mr. Hertzian's testimony though. This is just a
8 shorthand -- we're not trying to determine what the
9 issues are. This is shorthand to say these are the
10 witnesses that are involved in speed and angle, and so
11 the Staff may have a different take on what it
12 considers speed and angle from what we do. And the
13 same with ordinance. Currently, the Staff does not
14 yet have a witness for ordinance, but it's basic --
15 the list of witnesses basically parallel the expert
16 reports that are out there for PFS and the State, and
17 the Staff is based on their identification of
18 witnesses.

19 JUDGE FARRAR: Okay. Ordinance being the
20 additional concern for those planes that are carrying
21 ordinance. Is that right?

22 MS. CHANCELLOR: That's correct, and the
23 impact of ordinance on the cask.

24 JUDGE FARRAR: Okay. Same thing for the
25 jet fuel fires? What's radiation?

1 MS. CHANCELLOR: That's dose exposure. If
2 the cask, if the canister is breached or if the cask
3 is breached, what are the radiation dose effects.
4 That's the Thompson report for the State. Neither PFS
5 nor the Staff have an expert report on that. And my
6 understanding is that they're going to offer rebuttal
7 testimony on that.

8 JUDGE FARRAR: Is that the -- I thought
9 from what I remembered of the Applicant's theory
10 several months ago that they were going to concede
11 that if a cask breach happened, the consequences would
12 be - if I use the word "bad" - and that we didn't need
13 to explore what those were. That there's, in effect,
14 a concession that in our fractional formula where that
15 number is one.

16 MR. GAUKLER: I don't know if I would
17 characterize it as a concession, but that's as far as
18 we said we needed to go because we showed that with 1
19 X 10 to the minus 6, and everything else - even
20 assuming that it didn't have a dose greater than 5, it
21 didn't make any difference.

22 JUDGE FARRAR: It didn't make any
23 difference. That being the case, do we need to have
24 evidence that the radiation dose consequences would be
25 bad?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MS. CHANCELLOR: Yes. Our position is
2 that there will be a breach such that there will be
3 radiation consequences.

4 JUDGE FARRAR: Right. But if -- as I
5 understand it, the company is saying if you prove that
6 there'll be a breach, that there's a more than one --

7 MS. CHANCELLOR: I certainly that's a
8 probability then. I think that's an issue for the
9 merits, Your Honor.

10 JUDGE ABRAMSON: This is Judge Abramson.
11 Let me see if I can clarify this one. I think the way
12 I understand the company's approach, they're going to
13 really divide this into two sets of events - those
14 that breach, and those that don't breach. For those
15 that breach, they will accept the concept that they
16 release enough radiation that that's an event they'd
17 have to worry about. And, therefore, they're going to
18 concentrate on trying to demonstrate that the number
19 -- the probability of a non-breach is high enough that
20 we can eliminate worrying about the ones that do
21 breach.

22 MR. GAUKLER: That's correct, Your Honor.

23 MR. TURK: I have to say, I'm getting
24 nervous, not about your comments, Judge Abramson, but
25 about the whole discussion in terms of what should we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 be discussing on the telephone, what we should not be
2 discussing. It doesn't go to your comments in
3 particular, but I'm not sure where we're --

4 JUDGE ABRAMSON: What does that have to do
5 with timing?

6 JUDGE FARRAR: What it has to do with
7 timing is that this may be an issue that we don't have
8 to try. I'm not -- we tried the issue. We went
9 through the first trial and we did probability of
10 hitting the site, and the company said if the
11 probability of hitting the site is too high, we're not
12 -- well, they had a modest effort at consequences, but
13 basically that trial did not involve consequences.
14 And so we came out and said probability of hitting the
15 site is too high. You have to worry about it. So now
16 they're saying they're going to worry about it by
17 showing the probability of breaching the cask is small
18 enough that they don't have to worry about the
19 consequences.

20 JUDGE ABRAMSON: About what happens if you
21 do breach the cask.

22 JUDGE FARRAR: And what happens if you do
23 breach it and, therefore, why -- so if the State
24 proves that the probability of breaching the cask is
25 high enough, they win. The consequences are, I'll use

1 the word again, bad and the company loses. If that's
2 the case, why do we need to try the issue of
3 consequences?

4 JUDGE ABRAMSON: Well, I think --

5 JUDGE FARRAR: Radiation dose
6 consequences.

7 JUDGE ABRAMSON: Yes. If I may, I'm not
8 sure I would -- this is Judge Abramson again. It
9 seems to me that that's not exactly where we're going.
10 Where we're going is -- okay. Well, let me ask the
11 applicant where he's going with this.

12 Obviously, the next step in the analysis
13 is to look at the events that don't breach the cask,
14 and try to look at the probability of those and
15 demonstrate that that's high enough. Is that correct
16 for what you're doing right now?

17 MR. GAUKLER: That's what we're doing
18 right now, looking at the events that do not breach
19 the cask.

20 JUDGE FARRAR: And if he loses, he loses.

21 MR. GAUKLER: We always have the option to
22 go back to show that if we haven't breached, there's
23 no consequences, no significant consequences.

24 JUDGE LAM: So, Mr. Gaukler, you reserve
25 the right to address the consequence issue later on.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 But right now the assumption is if there's a breach,
2 there is an acceptable consequence; therefore, that is
3 your cut-off.

4 MR. GAUKLER: Yes, that's where we develop
5 our cut-off that we develop our number. Yes.

6 JUDGE FARRAR: But what does later on
7 mean, because later on in this hearing, or you have a
8 third bite at the apple?

9 MR. GAUKLER: I want a third bite at the
10 apple, Your Honor.

11 MR. TURK: The apple may not be as tasty
12 as it used to be.

13 JUDGE FARRAR: What I'm trying to get is
14 from some document you prepared some months ago, I got
15 the idea we weren't going to deal with radiation dose
16 consequences, because you were going to stand or fall
17 on showing the probability of breach is small enough
18 not to worry about. If that's what you're saying,
19 then Ms. Chancellor, you wouldn't need to put on
20 evidence that the consequence, radiation dose
21 consequences would be severe, because Mr. Gaukler is
22 giving you that. If he loses --

23 MR. GAUKLER: I'm not addressing it.

24 JUDGE FARRAR: Well, no, no, no, no. Then
25 if you're not addressing it, then Ms. Chancellor gets

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 a chance -- no, no. If you're not addressing it now,
2 it goes against you. There's got to be some end to
3 the litigation. If you're not addressing it now, and
4 you lose, that's the end. That's my instinctive
5 reaction. You can talk me out of it, but if you want
6 to reserve the argument that the consequences,
7 radiation dose consequences would not be overly
8 severe, then I think you've got to say now that you're
9 going to do that. If you're not going to do that,
10 then I don't need to hear from Ms. Chancellor and the
11 State on radiation dose consequences. Now you can
12 argue me out of what I just said, but that's -- while
13 you're thinking about that, Ms. Chancellor, what are
14 your thoughts on that?

15 MS. CHANCELLOR: Well, I'm waiting for
16 their reply, Your Honor. If we don't have to do
17 anything, that's great, but PFS may want to fall down
18 and get back up again.

19 MR. GAUKLER: It's something I have not
20 specifically discussed with my clients. I would need
21 to talk to my clients before I said yes to Your
22 Honor's interpretation of that. Now if they had not
23 raised the consequences, we would put anything in on
24 consequences, that's true.

25 JUDGE FARRAR: I know there's a basic rule

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 and commission precedent and custom, and folklore when
2 a company loses, they always get another chance. If
3 something is found inadequate, they can come back with
4 a new application or an amended application and say
5 okay, you said such and such wasn't seismically
6 qualified. Now we've got it seismically qualified. It
7 seems to me in this phase of this litigation, your
8 client needs to decide -- I was going to say your
9 client needs to decide whether to put on a
10 consequences case or not, but you would respond by
11 saying to me no, they don't, because we can always
12 come back. We won't be building a facility, but we
13 could always come back and show the consequence, the
14 radiation dose consequences are not too severe.

15 JUDGE LAM: Because the usual
16 consequences, litigation goes like this. What is the
17 mechanism of breaching the cask, and once it is
18 breached, what are the fissile inventory, and what are
19 the means of dispersal, and then what are the pathway
20 to human exposure. And so right now, the applicant's
21 approach is you would assume if it is breached without
22 any detailed analysis, there will be unacceptable
23 consequences. Therefore, the focus now is on what are
24 the means of breaching the cask.

25 MR. GAUKLER: That's what the focuses are.

1 JUDGE FARRAR: If that's the focus, then
2 we would say we don't need to hear from the State on
3 radiation dose consequences. They'll say wait a
4 minute, you're not going to -- suppose the company
5 loses, you're not going to make us come back for yet
6 again another hearing, are you?

7 MR. GAUKLER: Only if the company wanted
8 to go forward and litigate consequences would that
9 even be a possibility. At this point in time I am not
10 in a position to say we wouldn't do that, because I
11 have to talk to my client. I have not gone down these
12 different lines of what if scenarios down the road.

13 JUDGE ABRAMSON: Mr. Gaukler, can I pursue
14 this line of thought with you and Judge Lam for a
15 moment.

16 MR. GAUKLER: Yes.

17 JUDGE ABRAMSON: As Judge Lam accurately
18 stated, when one does this kind of analysis, one looks
19 at the probability of causing an event that release
20 something, and then the consequences of that release.
21 And you seem, to me, to be taking almost one minus
22 that approach. You're taking the approach that let's
23 look at the probability of an event that does not
24 cause a release, and see if we can demonstrate that
25 those events so dominate the field that what's left,

1 which could cause a release, has a very low
2 probability, and falls within the envelope of
3 acceptable probabilities. So your first estimate was
4 to look at the probability of hitting the site.
5 That's not the end of creating the number of the
6 probability of causing a release. You've got that
7 number, and you're now looking at further numbers
8 which will be multiplied by that first number, which
9 would give us a -- we're trying to get at the
10 probability of a release. Merely because something
11 hits a site doesn't mean it causes a release, so we're
12 now looking at the probability of something which hits
13 the site causing a release.

14 Do I correctly understand you intend to
15 explore those types of events thoroughly until you
16 have exhausted the types of events that don't cause a
17 release, and then come up with a number for the
18 probability of an event which might cause a release,
19 or which could cause a release from that by
20 subtracting those non-release event probability from
21 one. Is that --

22 MR. GAUKLER: That's what we've done. I
23 guess I wouldn't say we tried to find the precise
24 point at which you may have a release or may not have
25 a release. We picked a point for our analysis, and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 showed that that point in our analysis was below the
2 probability of 1×10 to the minus 6. We wanted to do
3 further analysis, a more detailed analysis, one maybe
4 below that.

5 JUDGE ABRAMSON: In other words, you're
6 saying that you haven't looked at all the events that
7 would not cause a release.

8 MR. GAUKLER: Correct.

9 JUDGE ABRAMSON: You picked a set of
10 events which you're quite confident would not cause --
11 which you are confident would not cause a release, and
12 you looked at the number for that. And from that,
13 you're interpreting the - if you will, the inverse
14 number - the number that would cause a release.

15 MR. GAUKLER: Right.

16 JUDGE ABRAMSON: But you haven't exhausted
17 the possibility of looking at all events which have
18 not caused a release.

19 MR. GAUKLER: Exactly right.

20 JUDGE ABRAMSON: And you would not look at
21 consequences until you felt you had exhausted that
22 non-releasing event.

23 MR. GAUKLER: I think Dr. Kenel sets forth
24 -- of course, we talked in this, a whole exercise
25 which was following Einstein's principle, as he put in

1 there, do what you need to do to establish what you
2 want to establish, which is and don't go beyond, don't
3 give more detail than what you really need to, take on
4 more complex calculations than what you may need to,
5 to show that you're okay, and that's what we've done.
6 We've done a set of calculations which we believe show
7 that we're okay, not saying we do more complex
8 calculations in terms of showing would be okay in
9 other events, or even more complex calculations yet
10 with respect to consequences to show you'd be okay.
11 But we've done what we believe is sufficient to show
12 that we're okay, and that we're going 1×10 to the
13 minus 6.

14 JUDGE FARRAR: And you would say that
15 that's all you'd litigate, but then if we say to the
16 State okay, you can put on a witness on radiation dose
17 consequences, you do rebuttal, and would you be
18 willing to have that be the end -- then that would be
19 the litigation on radiation dose consequences even
20 though you had not put on an affirmative case. In
21 other words, I'm not going to have the State put on
22 their evidence, and then you rebut it. And we say
23 well, your rebuttal didn't make it, the State wins.
24 And you say oh, I can go back and do some more. In
25 other words, at some point this litigation has to come

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 to an end.

2 MR. GAUKLER: I think we all agree with
3 that, Your Honor.

4 JUDGE FARRAR: Okay. Then why don't we do
5 this - you talk to your client. Ms. Chancellor,
6 you've been listening. Go ahead, and what are your
7 thoughts on this?

8 MS. CHANCELLOR: Your Honor, I think one
9 of the reasons that we have radiation and criticality
10 included in our Utah K Consequences proceeding is that
11 we got burned on seismic in this area, and we don't
12 want to get burned again. And if PFS is willing to
13 lay down and die and stay dead in terms of looking at
14 non-events and trying to make their case that way,
15 then we can think about whether we wouldn't need to go
16 forward with radiation doses. And I assume the same
17 thing would be true of criticality. But until PFS
18 decides how it's going to put on its case, I don't
19 think that we can respond as to whether this issue
20 should go forward or not.

21 MR. TURK: May I weigh in, however
22 lightly. If I may address the issue before the Board,
23 the standard that the Board has to decide or decide
24 against is has PFS evaluated credible accidents that
25 could result in the release of radiation in excess of

1 applicable standards, the 5 rem standard. PFS started
2 out, as Judge Abramson noted, by saying well, the
3 probability of impacting the site is so low that I
4 don't have to go further. It's not a credible event.
5 The Board found no, the probability exceeds the 1×10
6 to the minus 6 threshold criteria. PFS came back and
7 said all right, let me refine my probability approach.
8 I'll look to see which events are probable enough that
9 have to be considered, and the remaining events, if
10 they're not probable enough, if they're beyond the
11 probability standard 1×10 to the minus 6, I don't
12 need to look to see what the consequences are, because
13 they'll be on the same basis. They have come to you
14 and said here are the events that we believe are
15 probable enough to be credible under the Board's
16 existing decision, and we'll show that there's no
17 consequence in excess of the 5 rem.

18 JUDGE FARRAR: No, no, no.

19 MR. TURK: Well, if they don't get a
20 breach, they don't get the consequences.

21 JUDGE FARRAR: Right. If they win,
22 they're fine. My question is what if they lose?

23 MR. TURK: If you find that no, they're
24 wrong, that they could get a breach, then I don't
25 think that the Commission can say to an applicant you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 don't have a right to refine your approach further.
2 I don't think that you could, as a Licensing Board --
3 but let me refine my comment.

4 I don't think you could impose a
5 requirement that they then cease and desist forever,
6 unless what you do is find either that there's
7 agreement among the parties that that's what will
8 happen, or you find that the State is somehow unfairly
9 prejudiced by having to go back to hearing again on
10 radiation doses, rather than deal with radiation
11 exposures now.

12 JUDGE FARRAR: And bearing in mind that
13 the Commission has said more than once when they
14 thought we were going to finish last year, that this
15 has gone on long enough.

16 MR. TURK: Yes. But I think the question
17 of whether PFS should be precluded from ever trying
18 further really should be up to the Commission. And I
19 think that the pressure to get this case finished
20 probably comes from PFS' own actions, and that PFS has
21 been trying to get the Staff to move quickly, trying
22 to get the Board to move quickly, trying to get the
23 Commission to move quickly. And I think ultimately if
24 the Commission, besides at PFS' risk, if they want to
25 protract litigation by coming back to hearing again,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that's PFS that's doing it. I don't think that the
2 Board should say no, we won't allow further
3 litigation, because I think that would be an unfair
4 prejudicing of PFS' rights to try to make its case
5 before the Commission.

6 JUDGE FARRAR: Under that theory, even
7 more than we thought before, there's no parallel
8 between this and regular litigation where you get one
9 chance, so your argument that they have as many
10 chances to bring in new material as they want.

11 MR. TURK: In essence, that's correct.
12 Because rather than litigating past actions, you know,
13 what does the factual record show has happened in the
14 past. It's a prospective application that they're
15 trying to get, or license.

16 JUDGE FARRAR: All right. And that's the
17 answer, if Ms. Chancellor says when does it end, this
18 is not litigation about a past event.

19 MR. TURK: Yes.

20 JUDGE FARRAR: Ms. Chancellor.

21 MS. CHANCELLOR: Yes, Your Honor.

22 JUDGE FARRAR: Any thoughts you want to
23 add now? And remember how this came up. I don't want
24 to have you put on evidence on something that's not an
25 issue, not in issue.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MS. CHANCELLOR: I guess our frustration
2 is when does it end. And certainly, PFS should not be
3 able to go back and try the same issue over and over
4 again just by putting a widget here or there.

5 JUDGE FARRAR: Well, let's take the casks
6 that we talked about today. Suppose we found there
7 was -- let the contention in and found there was
8 something wrong with those casks. They could come
9 back and say okay, fine. Now we've got a new improved
10 cask. I understand your frustration. You don't like
11 that. You go to trial and you win, and then someone
12 says well, that was yesterday's game. There's another
13 game today. And it's not best four out of seven. For
14 you, it's best seven out of seven. And I understand.

15 MS. CHANCELLOR: Your Honor, I think the
16 difference is that at this late stage, we have no
17 analysis, so are we going to go stepwise ahead, and
18 then because this thing has dragged on for the time
19 that it has, then say well, we don't need an analysis.
20 We can just use procedures. And we're getting into
21 the realm of the off-the-cuff analysis and no real
22 license application that can stand on its own two feet
23 without going to a zillion documents. And so I think
24 it's getting more and more difficult, and less and
25 less defined as to what it is PFS is going to do.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 If you look at the decisions that have
2 come down, there is so much that PFS is going to do
3 post license, and now we're adding more and more to
4 that.

5 JUDGE ABRAMSON: Ms. Chancellor --

6 MS. CHANCELLOR: Mr. Soper wanted to say
7 something too.

8 MR. SOPER: Just an observation about the
9 end of litigation. I think that if an issue is put at
10 issue and tried, or the opportunity to present
11 evidence on that issue is there, whatever decision is
12 rendered is final as to the issue on the facts
13 presented. Now if PFS comes back with a new
14 application with different facts, then maybe that's an
15 issue that hasn't been tried. But it seems to me the
16 law is whatever the law is on whether or not they can
17 revive their application if they lose. I don't think
18 it's something that we have to agree on or has to be
19 part of this proceeding.

20 I think simply, if we're trying all issues
21 now, including radiation, and they elect not to put on
22 evidence of doses, then they're bound by that result
23 for the facts that are existing.

24 JUDGE FARRAR: Mr. Soper, you used an
25 important word there - "opportunity". Again going

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 back to the Commission precedent, an applicant comes
2 up with some design and it's found to be faulty, they
3 get an opportunity to improve it. What you're saying
4 here is they have an opportunity now to litigate this
5 radiation dose consequences. When they lose a
6 technical issue, they haven't had up to that point the
7 opportunity to litigate a new improved design. Here
8 you're saying they have an opportunity to raise this
9 at this point, and they should either take that
10 opportunity or give it up.

11 MR. SOPER: That seems to me to be the
12 case. If it's a different set of facts, if it's
13 different equipment or different something, then it's
14 essentially a new or amended application, and I'm not
15 sure what limitations there are, if any, on people
16 proposing serial applications for different
17 facilities. But on each facility, that one is judged
18 on its facts. And when you have the litigation on
19 that facility as to those issues that were litigated,
20 it seems to me they're final like in any litigation.

21 JUDGE FARRAR: Okay. Let's do this.
22 We've beaten this horse pretty much. Everybody think
23 about it. Mr. Gaukler, you talk to your clients, and
24 is criticality the same kind of issue?

25 MR. GAUKLER: Yes, it is.

1 JUDGE FARRAR: Okay.

2 MS. CHANCELLOR: No, it isn't.

3 JUDGE FARRAR: No?

4 MR. SOPER: We think not. We think
5 criticality is an issue that's separate and apart from
6 the probability. And we think that if criticality is
7 something that's a possibility, we think that renders
8 the application at risk or it shouldn't be granted.

9 JUDGE ABRAMSON: I'm sorry. This is Judge
10 Abramson. Let me ask you what aspect of criticality
11 is you're addressing. Are you addressing the possible
12 criticality of the fuel in the storage containers on
13 the site when all 4,000 of them are there? Is that
14 the criticality issue you intend to address? What
15 aspect of criticality are you trying to address?

16 MR. SOPER: The thing that we've looked at
17 is that when there's a cask impact, for example by an
18 aircraft is what we're dealing with, and the impact
19 causes a change in the geometry of the fuel and the
20 fuel basket. And also, if there is a moderator
21 introduced, such as water from the first responder or
22 jet fuel, then there's a possibility of criticality.

23 JUDGE FARRAR: Would this only apply in
24 case of a breach?

25 MR. TURK: Yes, because the moderator --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE ABRAMSON: The moderator is only in
2 the case of a breach, but the canister itself --

3 MR. GAUKLER: It would have to be inside
4 the canister.

5 MR. TURK: There would have to be a
6 mechanism to enter the MPC, so it is a conditional
7 probability. You first have to get to a breach of the
8 MPC before you can introduce the moderator.

9 MR. GAUKLER: That's what I understood
10 there claim of criticality would be, that was premised
11 upon a breach.

12 MR. SOPER: If I might finish in that
13 regard, PFS' analysis excludes the bounding events.
14 It does not look at the high speed crashes, does not
15 look at impacts that are likely to breach the cask, so
16 they've excluded any analysis on that. We have not --
17 in fact, we show that there's a number of scenarios
18 where the cask is breached, including the MPC, and
19 that there is a likelihood, in fact, of criticality.

20 JUDGE ABRAMSON: Mr. Soper, this is Judge
21 Abramson. Let me see if I can't streamline this
22 process a little bit.

23 What I hear the applicant saying they want
24 to do is they want to address only events that don't
25 breach casks, and so they're going to focus on trying

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 to figure out which events those are. And I've seen
2 some submittals from the State that indicate you
3 disagree with them on what the boundaries of those
4 events are that don't breach casks. But if the
5 applicant and you focus only on events which don't
6 breach casks, and between the two of you, you agree on
7 what those sets of events are that don't breach casks,
8 and if as a result of finding all the events that
9 don't breach casks, you wind up with the probability
10 of breaching a cask, being far enough below the
11 acceptable threshold for credible events, one needs
12 never look at what happens if one breaches a cask.
13 And I think the applicant is focusing on trying to
14 define those events which don't breach casks. And if
15 you can focus on the same, at least you're not going
16 at different paths.

17 MR. SOPER: It's my understanding, Judge,
18 that the -- for instance, the NUREG guidance on the
19 review of casks requires that the bounding events be
20 analyzed, and in the event that there's criticality
21 with the possibility of the accidents, even bounding
22 events that may be less than 10 to the minus 6, and
23 criticality results that is an unacceptable condition.

24 JUDGE FARRAR: I think we understand
25 everyone's position. Everyone think about it some

1 more, and we'll come back to this, but we need at some
2 point to resolve whether it's necessary and/or
3 appropriate to hear the State's evidence given what
4 the issues are. We don't want to keep it out if it's
5 relevant, but if it's an issue that we don't need to
6 decide at this juncture, that would save us some time.

7 All right. Let's move from that. So we
8 have something like 16 panels, which Mr. Gaukler will
9 tell me can easily be done in three weeks. Mr. Turk,
10 how long do you think 16 panels would take?

11 MR. TURK: I'm hoping to modify the list.
12 For instance -- I don't see 16 panels, but I think
13 hearing time, minimum three weeks or four weeks, quite
14 possibly.

15 JUDGE FARRAR: Ms. Chancellor, what do you
16 think about hearing time?

17 MS. CHANCELLOR: Always more than Mr.
18 Gaukler suggests, probably four weeks.

19 JUDGE FARRAR: Okay. Mr. Turk, you say
20 you're going to try to cut down.

21 MR. TURK: I don't think that the State
22 has entirely accurately broken up the panels. The
23 Staff, for instance, is going to put on a single panel
24 for casks and CTB. That could change. We may have
25 the Sandia people who are only looking at the casks

1 appear for part of that panel's discussion, rather
2 than -- and possibly ask the Board to excuse them
3 after we're done dealing with the cask portion of the
4 combined testimony. That's one way we might pare down
5 the number of --

6 JUDGE FARRAR: Well, actually the State
7 only charged you with five panels here. You've got
8 more than that.

9 MR. TURK: I don't think that's a good
10 count.

11 JUDGE FARRAR: Even if the casks and CTB
12 are together, that's one. Probability is another, and
13 we've got four, five listed -- four listed above that.

14 MR. TURK: We have not identified to the
15 State yet exactly how we're going to break up the
16 panels. We had indicated on the phone that we would
17 probably put the radiation and criticality together on
18 the same panel, since that's more or less a
19 conditional of what if you get a breach sort of a
20 discussion. Probability we might combine either with
21 aircraft angles and speeds, or with structures, rather
22 than have him appear on his own. Ordinance would not
23 be a separate panel, but will be incorporated into our
24 discussion either of speeds and angles or structure,
25 more likely structure.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MS. CHANCELLOR: If I may, Your Honor,
2 you'll notice beside panels, and I just took a stab at
3 trying to put something on paper --

4 JUDGE FARRAR: Oh, yes. No, the --

5 MS. CHANCELLOR: And the way I broke out
6 the staff's panel, the same panels for CTB and cask
7 structure, that was one. Probability is two.
8 Criticality and radiation, three. Jet fuel fires is
9 four. Speed and angle is five. And I put the sixth
10 as a possibility of splitting radiation and
11 criticality, and that was just based on conversation
12 with Mr. Turk, and just trying to put something on
13 paper for today's discussion.

14 JUDGE FARRAR: Ms. Chancellor, no need to
15 apologize. This is very helpful, because it gives us
16 something to begin to work from.

17 MR. TURK: But if we look in broad terms,
18 think it's fair to expect that each party would
19 require a week for its witnesses to go on and off, so
20 that's a minimum of three weeks of hearing. And
21 whether it breaks out to four weeks or not, I think
22 it's quite possible, more likely than not the way
23 things have gone.

24 MR. GAUKLER: It depends I think in part
25 on whether or not the State chooses to challenge some

1 issues. Now they have nothing with respect to jet
2 fires, and they filed nothing in terms of reports
3 respect to cask transfer building. It's my
4 understanding they haven't decided yet. They want to
5 wait and see what the Staff's report says on those
6 matters before they're going to assume, either with
7 depositions or hearing, and obviously, if they go
8 forward on those issues, then they'll probably end up
9 having somebody testify on them in rebuttal. If they
10 don't go forward, we would eliminate, I would think,
11 those two topics. It's something that is not clear at
12 this point in time, just like the radiation issue is
13 not clear at this point in time.

14 JUDGE FARRAR: Let me ask you, are you
15 going to have you give us cross examination plans and
16 we hold you to the plan, or Mr. Turk, you just say
17 let's make it simple. Each party has five panels,
18 hypothetically. We want that party to be finished in
19 a week. The way that party is finished in a week is
20 you say to each of the other parties you get three
21 hours for cross examination. You can ask good
22 questions or you can ask bad questions, but three
23 hours your time is up because we're going to finish
24 this panel in one day. Is anyone in favor of that
25 system?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. GAUKLER: I might be in favor of a
2 system where each side gets so much cross examination
3 time. I really see the focus of this hearing to be on
4 the cask structure. That's where the focus of the
5 expert reports really have in terms of differences of
6 opinion have focused on. It's been on the cask
7 structure in terms of the analysis that we've
8 produced, and the analysis the State has produced.
9 They've challenged us in terms of some of the
10 probability stuff, in terms of sensitivity-type of
11 analysis, but they haven't really produced their own
12 probability analysis, like we haven't produced our own
13 consequences analysis. So I think the focus of this
14 hearing is going to be on cask structure.

15 JUDGE FARRAR: But you said -- so you're
16 saying each party will get 30 hour - pick a number.

17 MR. GAUKLER: Right, pick a number.

18 JUDGE FARRAR: Thirty hours of cross
19 examination. You can use it all on one panel, or you
20 can be six hours on each of the ten panels who on the
21 other side.

22 MR. GAUKLER: That's correct. That's the
23 way I would proceed. I would not see, in terms of
24 what I see in --

25 JUDGE FARRAR: Ms. Chancellor, what do you

1 think of that?

2 MS. CHANCELLOR: I have a couple of
3 comments, and then Mr. Soper does. If we have a total
4 number of hours for cross examination, what I found in
5 the past is most of our time is eaten up by objections
6 and other parties' comments. And so if we have a
7 total number of hours, then we would want to not have
8 counted towards us all the interruptions and
9 objections.

10 JUDGE FARRAR: It will be like a chess
11 clock. The other side starts talking, you hit the
12 clock and it comes out of their time.

13 MS. CHANCELLOR: And I think that going
14 back to the seismic hearing, that you want to set some
15 fairly strict time limits on rebuttal. That's where
16 the time just got eaten up and basically out of
17 control. And so I think that if you set strict
18 constraints on rebuttal, and then maybe had a running
19 time for cross examination, that may work. But I
20 think Mr. Soper has a couple of thoughts.

21 MR. SOPER: It just seems to me that the
22 applicant having the burden on this to prove their
23 application, and the State has the ability to make its
24 entire case by cross examination, if it so desires, it
25 seems to me that the State ought to have more cross

1 examination time than the applicant.

2 JUDGE FARRAR: Does that tie in with the
3 notion that in these past months, the applicant and
4 the staff get as much time as they want to prepare
5 their case. And you're saying your counterbalance to
6 that is your cross examination time?

7 MR. SOPER: I think that's part of it,
8 Your Honor.

9 JUDGE FARRAR: You all were talking then
10 about oral rebuttal that each witness would have on
11 the stand. How about the question we raised in our
12 last order? We talked in the last pre-hearing
13 conference about having a witness adopt his or her
14 direct testimony, and then launch into rebuttal of the
15 other side's testimony. Do we want that rebuttal to
16 be prefiled, which I believe the new Part II calls
17 for, which is not applicable to this proceeding.

18 JUDGE ABRAMSON: Which would certainly
19 make the material available to each party much more
20 complete before he started to put on his oral case.

21 MR. GAUKLER: That's what we did in the
22 seismic case, we actually did write our rebuttal,
23 albeit we filed it later on. I have no objection to
24 that. Certain things are going to require more time
25 to do a written rebuttal than it is just to do the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 oral rebuttal.

2 JUDGE FARRAR: It would require more time
3 before the hearing started.

4 JUDGE ABRAMSON: But it would clarify, I
5 think crystalize people's positions much more.

6 MR. GAUKLER: I guess the way I -- in
7 terms of where I've come down on rebuttal in terms of
8 thinking about it, is that it's to the advantage of
9 the party who can get it written to have a written
10 rebuttal because it gets his or her position out
11 clearer. Yet, I'm concerned about the time factor, as
12 well, in terms of extending extensively the
13 pre-hearing time. So I guess my thought was leave it
14 up to the discretion of the parties, because it is to
15 the benefit of the party, I think, to have written
16 rebuttal. And that's what we did in the seismic case
17 with all the witnesses that we presented. We did list
18 very -- a big burden to do it. We went ahead and did
19 it.

20 JUDGE ABRAMSON: When you're preparing for
21 rebuttal, preparing your witnesses for rebuttal, et
22 cetera, I assume you prep them quite thoroughly and
23 essentially have all the material ready for rebuttal,
24 so you have the substance of your rebuttal, even if
25 you may not have written it in a form you'd like to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 present it.

2 MR. GAUKLER: That's probably true, yes.

3 MS. CHANCELLOR: Your Honor, I think there
4 would have to be strict timing limits, because if PFS
5 would present its case first, it would have more time
6 to write rebuttal testimony than the State would. And
7 I just don't know how much time savings there would
8 be. You'd have to -- as you said, you'd have to
9 extend the time before the hearing, and it takes a lot
10 more effort to put things on paper than it does to
11 communicate with a witness, and talk about rebuttal
12 testimony, and put that witness on the stand directly
13 after his or her testimony. And I think it would be
14 more efficient and the parties could concentrate on
15 preparing for trial, rather than preparing to document
16 rebuttal testimony.

17 And in addition to that, the Board has
18 requested key determinations, and also a cross
19 examination plan. It just seems like that you are
20 heaping more and more onto the lawyers before the
21 hearing, and then we've got the problem of safeguards,
22 and we can't e-mail anything to you the night before
23 like we did, for example, with our cross examination
24 plan. So I'm not enamored with the idea of written
25 rebuttal, because --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. TURK: If I may comment on a few
2 points that have been made. First, starting with
3 rebuttal, both PFS and the State have told me that
4 they want depositions to go forward, and they both
5 expect the depositions to last approximately a month.
6 I don't see why at the conclusion of all of the
7 depositions we won't know what each party intends to
8 say on the witness stand. And I don't see why
9 testimony could not be drafted initially to address
10 everything that was discovered and explored, both in
11 the reports and in depositions. So I would imagine
12 that our prefiled testimony addresses everything.

13 JUDGE FARRAR: See, your prefiled contains
14 in it not only your story, but your rejection of the
15 story of the people that you deposed.

16 MR. TURK: Or the people that we disagree
17 with.

18 JUDGE FARRAR: That you disagree with.

19 MR. TURK: And if, for instance, I'll take
20 a hypothetical - if the Staff does something in its
21 evaluation of the State's report, and we find we don't
22 agree with the State, we would put that either into
23 our report or into our testimony. We wouldn't be
24 doing it as rebuttal waiting to see if the State goes
25 forward. If the State, however, in its prefiled

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 testimony doesn't address the issue, we can strike it
2 from our prefiled. So we'll be prepared with our
3 written testimony to hit on all the issues that were
4 raised in discovery.

5 JUDGE FARRAR: So your direct includes --

6 MR. TURK: Our rebuttal.

7 JUDGE FARRAR: -- your rebuttal of the
8 other side.

9 MR. TURK: That's right. The only thing
10 that I think we should leave for rebuttal is if a
11 witness says something on the witness stand that was
12 unexpected, that goes beyond what they revealed in
13 discovery, then we'd have a need to address that new
14 matter. But I thought in the seismic process, we had
15 far too much rebuttal on matters that we really knew
16 about in advance.

17 JUDGE ABRAMSON: Why was that?

18 MR. TURK: Because it wasn't in the
19 prefiled testimony of the other parties.

20 JUDGE FARRAR: What would be different now
21 -- I know it's my feeling about that rebuttal, that we
22 were repeating stuff and it was taking a long time.
23 It made it hard to follow the train of thought. What
24 is different now that you're written prefiled would be
25 "better" than before?

1 MR. TURK: Let me address seismic for a
2 minute, Judge Abramson just asked me about. As I
3 recall the process in the seismic hearings, someone
4 would come up with testimony that would raise new
5 challenges, for instance to PFS' cask stability
6 analysis. PFS would then to address what was in that
7 testimony do more analyses, and present that as
8 rebuttal. And then the State had to come out and say
9 well, here's what's wrong with that additional piece
10 of evidence. But I don't see why we can't just get
11 everything done now through the discovery process. If
12 in the course of depositions it turns out that a
13 witness is caught flat-footed and hadn't done an
14 analysis, which he decides he now has to do, we should
15 be getting that done and serving it before we get into
16 the hearing room. In fact, before testimony is filed.

17 JUDGE ABRAMSON: So are you suggesting,
18 Mr. Turk, that we wouldn't admit testimony that hadn't
19 been available during discovery?

20 MR. TURK: I wouldn't say don't admit it,
21 but I think we would then recognize that that's a new
22 matter that could not have been embraced in the direct
23 testimony. That might require the additional filing
24 of rebuttal, but I would hope that everything can come
25 out in discovery and be addressed in the testimony,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 except to the extent there are new analyses that have
2 to be done that hadn't been done before.

3 JUDGE FARRAR: With all this time that's
4 been going on, why do people need new -- or it seems
5 to me you should be building your case, and making
6 your case, and living with the case you built.

7 JUDGE ABRAMSON: I think part of the --
8 just to respond to that. I think what the State
9 probably will say to us, maybe I should ask the State
10 whether you'll say this to us, is that in a number of
11 instances they don't know what they need to analyze
12 until they do the depositions of PFS' witnesses and
13 the Staff's witnesses. Is that accurate?

14 MS. CHANCELLOR: Absolutely accurate. And
15 then even when you do the depositions, you don't
16 always get what you want, or the testimony changes by
17 the time it gets written on paper, so to go from --
18 first of all, you need depositions and then number
19 two, deposition to written testimony is often
20 different.

21 JUDGE LAM: I think --

22 MS. CHANCELLOR: I mean, to the extent
23 that we could include some rebuttal testimony in our
24 direct testimony, that may be feasible, but I don't
25 think that we should be then restricted from any

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 rebuttal testimony and get into arguments whether it's
2 within the scope of depositions or not.

3 JUDGE LAM: I think perhaps make it
4 discretionary instead of mandatory would be a good
5 solution, Ms. Chancellor.

6 MS. CHANCELLOR: I'm sorry, Judge Lam. I
7 didn't quite hear the question.

8 JUDGE LAM: I think making the written
9 rebuttal a discretionary thing rather than a mandatory
10 requirement would solve the problem.

11 MS. CHANCELLOR: Number one, I think it's
12 very important to put -- if it's going to be written,
13 then there needs to be some sort of date certain that
14 is fair to all parties, because PFS goes first. And
15 if it has the opportunity to file rebuttal testimony
16 after it's put on its testimony, that would not be
17 fair, for example.

18 MR. GAUKLER: I think what we're talking
19 about --

20 JUDGE FARRAR: Let me interrupt, Ms.
21 Chancellor. The first question was everybody does
22 their written direct, and then everybody does their
23 written prefiled.

24 MR. GAUKLER: Written rebuttal you mean.

25 JUDGE FARRAR: I'm sorry, the prefiled

1 written rebuttal.

2 MS. CHANCELLOR: I think it's very
3 difficult, especially -- we may have to do a written
4 rebuttal in D.C. I just don't think that the time
5 that we spend writing rebuttal testimony and filing
6 it, I don't think you get -- maybe it crystallizes
7 things for the Board rather than hearing things for
8 the first time when a witness testifies. Maybe it's
9 easier for you, but it is much more difficult for the
10 lawyers when there are many additional things that
11 need to be done after we pick ourselves up off the
12 floor from filing prefiled testimony. Then we have to
13 file key determinations. Then we have to file a cross
14 examination plan. Now you're saying that we have the
15 option, and if it's an option everybody will do it,
16 because they'll be afraid that - they don't want to
17 miss out.

18 The option of filing prefiled rebuttal
19 testimony, I think that you give in one place, the
20 quality is going to suffer in the other, and so I
21 think that if we can try and put as much as we can
22 into our prefiled testimony, rebutting the other side,
23 and then supplement that with oral testimony at the
24 time the witness takes the stand to adopt their
25 testimony that, to me, seems the most efficient way to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 do it.

2 JUDGE FARRAR: Okay.

3 MR. TURK: To me, that sounds like what we
4 did in the seismic hearings. I don't think there's
5 anything different in what Ms. Chancellor is
6 proposing. Judge Abramson asked a question about
7 whether, for instance, the State might not be doing an
8 analysis until they go to depositions of the other
9 side so that they can decide what it is that they need
10 to address.

11 I think because PFS has had its reports
12 out already for quite some time, even with
13 modifications, for instance, the revised report that
14 came out in January, and the staff will be issuing its
15 reports before we go into deposition on those matters,
16 that the State -- well, maybe with respect to the
17 Staff analysis it's asking too much, but at least with
18 respect to the PFS analyses, by the time we get to
19 depositions, they should know what it is in the
20 applicant's report that they disagree with, and they
21 should be doing their analyses already before
22 depositions so we can ask them about where they
23 disagree with what PFS has done.

24 JUDGE ABRAMSON: And I think I've seen
25 some of that in their submittals.

1 JUDGE FARRAR: Let's go back to the
2 seismic hearing, and what you just said may be true
3 about the State. What I remember about the seismic
4 hearing is Dr. Singh and Dr. Soler would run home -
5 this is exaggerated paraphrase and you get the point
6 - would run home every night and do another analysis,
7 and in it would come. We can't be having that. I
8 wouldn't think that eight -- that will be twelve
9 months after the company first filed its stuff. We
10 can't be having new analyses being done every night
11 during the hearing.

12 I suppose you say well, that's the best
13 evidence we could get, but how does the other side get
14 to prepare for those?

15 MR. TURK: If the other side identifies in
16 their depositions where they disagree with what PFS
17 has done, or what they think is missing, then PFS in
18 its prefiled testimony can put all that in.

19 JUDGE FARRAR: Right. But how about in
20 the middle of the hearing?

21 MR. TURK: I'm sorry. But if the State in
22 its deposition says well, we don't yet because we
23 haven't thought about it, or we haven't completed our
24 analyses, then we're in the position where PFS or the
25 Staff doesn't know what it is that they have to

1 address, because they haven't seen what the State is
2 coming up with.

3 MS. CHANCELLOR: The other question is, we
4 don't know because we're uncertain of some of the
5 parameters that are used in the analysis, and it's
6 unfair for us to have to defend against -- in
7 deposition to be expected to come up with our final
8 position at hearing when we haven't had the
9 opportunity to ask PFS and the Staff experts what
10 actually went into their report detail by detail. And
11 that's what we're missing prior to us having
12 depositions.

13 We have done an analysis. We filed it.
14 We have filed an expert report, several expert
15 reports. And so just like what we talked about this
16 morning, lack of details. This occurs in many
17 instances.

18 MR. TURK: In fairness to the State, let
19 me say that part of the problem is that the time for
20 filing testimony comes right on the heels of
21 concluding depositions. If we weren't on an expedited
22 schedule and we could have several months time between
23 concluding discovery and filing testimony, then all
24 parties could get whatever additional analyses have
25 been done in advance and then address it in our

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 testimony.

2 JUDGE ABRAMSON: But if your approach is,
3 as the schedule you set out last fall indicates, that
4 you have four weeks for discovery, and then you have
5 a few more weeks, and then you have to file written
6 testimony, that written testimony may contain material
7 the other side hasn't seen.

8 MR. TURK: Right.

9 JUDGE ABRAMSON: And you will need time to
10 digest that. And while you're digesting that, maybe
11 it makes sense to put enough time in to digest it, and
12 then file some more testimony which rebuts what you've
13 seen which is new, and then a period of time to
14 develop your key determinations. And then go into the
15 hearing. Let's talk about a schedule that gives
16 everybody a fair opportunity to prepare its case, gets
17 all the facts that we're able to get down on paper,
18 and then go into the hearing. I don't think we're
19 talking about a huge extension of the time.

20 MR. GAUKLER: I know we tried to do it in
21 our analysis, in testimony. We did try to include
22 responses that were done in depositions, that we
23 picked up in depositions. Our prefiled testimony
24 would say here's our case in chief, here's what people
25 have said. And some of the analysis we did during the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 hearing, we're responding to specific things that came
2 up in the testimony at the hearing itself. Like
3 somebody says something on day one or day ten, that
4 night we did an analysis to respond to what the
5 State's witness said on that day.

6 I think maybe what Judge Abramson has said
7 is a good idea, that we have some type of written
8 rebuttal. Then you put in your written rebuttal and
9 your direct testimony at the same time.

10 JUDGE ABRAMSON: Put your written in, and
11 because there's going to be some new material in each
12 party's written that the other hasn't seen, take some
13 time to digest it. Then put in a written rebuttal.
14 And then -- so we add whatever it takes, a few weeks
15 to provide -- a couple of weeks to provide written
16 rebuttal. Having done that, we just lengthen the
17 schedule by that particular time frame. But now
18 you've got everybody's -- you've got a much more
19 complete package in front of both parties. And
20 whatever the State -- I mean, I think we have to talk
21 about time frames that work for both parties.

22 JUDGE FARRAR: On that note, let's turn to
23 -- someone gave us a proposed schedule. Mr. Turk,
24 this was you?

25 MR. TURK: Yes. You're looking at the --

1 JUDGE FARRAR: Proposed schedule based on
2 licensing board's scheduling order and report. It has
3 three -- Ms. Chancellor, do you have this now? It
4 has -- was that faxed to you - milestone in the black
5 column, scheduled date and new date.

6 MS. CHANCELLOR: We're just checking, Your
7 Honor. If you could hold just one moment.

8 JUDGE FARRAR: Okay.

9 MR. TURK: We asked for that to be faxed
10 to you about maybe 20, 25 minutes ago.

11 MS. CHANCELLOR: We were just so entranced
12 in the argument, Sherwin, we forgot to go out and
13 look. I beg your pardon.

14 JUDGE FARRAR: That happens to us a lot,
15 Ms. Chancellor.

16 MS. CHANCELLOR: I must say, the State
17 doesn't object to filing written rebuttal testimony if
18 we've got time to digest what has come in beforehand.
19 I was just looking at what we had done on the past
20 schedules, and having no time at all to do everything.

21 JUDGE FARRAR: Well, I was surprised to
22 dig out last fall's schedule and find that you all
23 only gave yourselves two weeks between the end of
24 discovery and the written prefiled. Is that - -

25 MS. CHANCELLOR: Yes, I think that was a

1 little optimistic.

2 MR. GAUKLER: That was what we gave
3 ourselves - yes. It came from --

4 JUDGE ABRAMSON: Were you trying to meet
5 a particular deadline at that point?

6 JUDGE FARRAR: No. We were passed year
7 end.

8 JUDGE ABRAMSON: You already passed year
9 end.

10 JUDGE FARRAR: I didn't go back to the
11 earlier schedule, the year-end schedule to see what we
12 had done. Maybe we could just pick up with that.

13 MS. CHANCELLOR: Your Honor, we now have
14 Mr. Turk's schedule in front of us. Thank you for
15 waiting.

16 JUDGE FARRAR: Let's just all look at it.
17 Okay. We've got -- you've allowed, Mr. Turk, three
18 weeks for -- three and a half weeks for discovery, and
19 two weeks after that for filing testimony. And the
20 hearing three weeks later.

21 JUDGE ABRAMSON: And I think what we're
22 talking about now is putting in a few intermediate
23 steps between filing your written testimony. We would
24 then put in a step that would permit filing of written
25 rebuttal, then some time, and filing of key

1 determinations, then some time for everybody to digest
2 that, and then the hearing. So two more steps
3 in-between filing of written testimony and the
4 hearing, but it would crystalize, I think, a lot of
5 things for the hearings.

6 MR. TURK: I would suggest instead of
7 putting in a milestone for filing of rebuttal
8 testimony, filing any additional analyses or studies
9 that a party wishes to rely on. And then the
10 testimony of the parties can address that, rather than
11 the --

12 JUDGE ABRAMSON: That's okay. Yes. I
13 mean, the idea is to just let's get the written record
14 as complete as possible. Then when you file your key
15 determinations, you really in theory should have
16 almost everything in front of you, not only
17 crystallized your own package, but crystallized what
18 the other party is saying.

19 MR. TURK: If we conclude depositions at
20 a certain date, for instance under this schedule it
21 says May 14th we'd be done with depositions - put in
22 a date similarly set for that for the filing of any
23 additional analyses that a party wishes to rely on
24 that result from the depositions.

25 JUDGE ABRAMSON: So after discovery, put

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 in another milestone that says file additional
2 whatever it is.

3 MR. TURK: Whatever it is. Now would we
4 go to discovery on that additional analysis, or would
5 you just take the chance and address that in hearing,
6 in cross examination at hearing?

7 JUDGE ABRAMSON: Or would you cover that
8 in your written -- how does that fit in with the
9 written testimony, or is that part of what's written
10 testimony, written testimony plus whatever additional.

11 MR. TURK: My concept would have been that
12 the written testimony addresses that, plus whatever
13 had come before.

14 JUDGE ABRAMSON: Okay.

15 MR. TURK: But the real question is, for
16 instance, if the State now comes up or PFS now comes
17 up with brand new analyses, will the other parties
18 have a chance to discover on them before we go to
19 hearing, or do we forget that and the discovery will
20 take place in the hearing room?

21 JUDGE ABRAMSON: Well, I would think you
22 would want to file -- you would want to prepare some
23 rebuttal. Whether or not you needed to discover that,
24 you certainly need to prepare rebuttal of this new
25 material, both sides. Right?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. GAUKLER: I would say that you would
2 have any additional analyses would be part of your
3 prefiled direct testimony. And then there might be
4 some written rebuttal as we talked about, after that.
5 Otherwise, you get too many steps in there.

6 JUDGE ABRAMSON: So we'd have a discovery
7 period. Then you'd have a date certain after that.
8 Discovery would end on date one, and at the end of
9 date -- at date two you would file written testimony
10 which would contain whatever rebuttal you wanted of
11 other materials that you learned during discovery, and
12 whatever additional material you wanted. Is that what
13 I hear? Then we'd have date three that would be
14 whatever written rebuttal you wanted to submit of the
15 other parties' information. And then for all of our
16 benefits, date four would be key determinations. And
17 I promised all of you I would look at some from last
18 time. And when you're ready, I'll give you my
19 feedback on what you did last time. And then we'd
20 have the hearing at some short period after that.

21 MS. CHANCELLOR: Judge Abramson, you're
22 suggesting that there be additional analyses if a
23 party wanted to, and that additional analyses would
24 not be subject to discovery?

25 JUDGE ABRAMSON: That's up to you. If you

1 would like to have discovery on that, I think you --
2 that's completely up to you. What I am understanding
3 from this discussion is that you had additional
4 analyses come up during the hearing in your last
5 hearings, and that you had to deal with it by cross
6 examination and somebody going -- as other judges have
7 put it, going home and doing stuff at night, and
8 showing up the next day with it. If you think it's
9 more effective to have some small period of discovery
10 on that, then we should try to introduce it.

11 You tell me what's the best way to have a
12 complete record so once we start the formal hearing we
13 can -- you'll have as much as you need in front of
14 you, without extending the pre-hearing period to some
15 absurd length.

16 MS. CHANCELLOR: I think we'll get into an
17 absurd length if we keep on doing additional analyses
18 and additional discovery. There has to be an end to
19 analysis at some point, and the parties rely on that
20 analysis.

21 Looking at what Mr. Turk has put in front
22 of us, I'd like to step back to depositions, and they
23 start the day on which the State receives and PFS
24 receives the Staff's expert report. So I think we
25 need to build in some additional time at the beginning

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 of discovery for the State and PFS, if it wants to, to
2 add for its experts to analyze the Staff's report,
3 because that may change the way in which we present
4 our case. And so if we've got to go deposition, if
5 the depositions are to be effective, they need -- the
6 deponent needs to have had an opportunity to codify
7 their thinking and take into account the Staff's
8 analysis. Number one, I think that the start of
9 depositions should be at least ten days after we get
10 the Staff's report. Three weeks may not be long
11 enough for depositions given the difficulty we will
12 have in coordinating schedules. We've got people
13 located all over the country, and one person in
14 England. And I think that if we prefile testimony and
15 file rebuttal within that testimony, and then have
16 some additional time built in for further written
17 rebuttal, as you suggested, Judge Abramson, that that
18 would give the Board everything in front of it prior
19 to us actually going to hearing, and also time for key
20 determinations.

21 JUDGE LAM: How much time do you need, Ms.
22 Chancellor?

23 JUDGE ABRAMSON: Yes. Let's -- you said
24 three weeks wasn't enough for the discovery. What
25 kind of time frame are you thinking? Would four be

1 adequate?

2 MS. CHANCELLOR: What was done in the past
3 is that we coordinated amongst ourselves, and based on
4 witness availability, have tried to tentatively
5 schedule depositions, and then let the Board know how
6 much time we will need. But I think we would need
7 four weeks. But again, we have just sent feelers out
8 to our experts because we didn't know at what date we
9 would be starting depositions, and so we're waiting to
10 hear back from them as to their availability.

11 JUDGE ABRAMSON: Ms. Chancellor, what do
12 you think would be the time you would need after you
13 finished your depositions before you were able to file
14 your written testimony and whatever rebuttal you
15 wanted, and other materials related to -- that you
16 felt you needed to file as a result of your
17 depositions?

18 MS. CHANCELLOR: Well, if it weren't
19 safeguards, we may be able to do it a little quicker,
20 but we're going to have to do everything by overnight
21 mail, so I would think about three and a half weeks.

22 JUDGE ABRAMSON: All right. And then
23 after that, how much time do you think would be
24 appropriate to digest that and file whatever written
25 rebuttal of what you'd received, a couple of weeks?

1 MS. CHANCELLOR: Yes.

2 JUDGE ABRAMSON: Okay. So now we've got
3 everything written, and you've written everything.
4 You've got the other side's everything written. How
5 long to give us some key determinations. By the way,
6 the length of what I saw last time -- so now I'll tell
7 you what I think of what I saw in key determinations.

8 JUDGE FARRAR: I gave Judge Abramson all
9 three of your key determinations from the aircraft
10 proceeding, not from seismic.

11 JUDGE ABRAMSON: And because I'm
12 physically closest to the staff, I'll look at
13 something the staff gave you last time, and tell you
14 what I think is good, and goes down the path that I
15 think would be useful to all of us. And I don't mean
16 just the panel, I mean useful to the litigants, as
17 well.

18 If you look, for example, at the staff's
19 outline of proposed key determinations for Utah K, and
20 you look at what they submitted in Item 2.D, where
21 they're looking at aircraft crash data, in D.1 --
22 sorry, in D.2, the approach I think is exactly what
23 helps everybody.

24 D.2, they were looking at trying to
25 determine the N, and they started with a conclusion,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 which I don't care whether you start with a conclusion
2 or not, but they concluded the PFS estimate of N is
3 conservative. Then they stated two facts that
4 supported that conclusion. The first fact was up to
5 10 percent of all flights assumed for N don't transit
6 Skull Valley. And the second fact was that
7 approximately half the flights would have negligible
8 potential because they fly in formations, whereby no
9 more than one or two would be pointing at PFSF. So to
10 me, that's the kind of key determination I'm looking
11 for - what conclusion would you reach, and what facts
12 support that conclusion. Okay.

13 And another one I thought was in that same
14 line, was in looking at the crash probability rate,
15 the staff looked at -- if you look at B.3, they said
16 they looked at the issue of whether the crash
17 probability rate is affected by fleet aging. And they
18 concluded it was not, and the fact that they used to
19 support that is they looked at the "bathtub effect",
20 and said the data from -- the data shows there's no
21 bathtub effect. And then they added something which
22 I think is a little conclusory, and I would have
23 preferred to have data to support it - they added
24 something that - a sentence that said "newer military
25 aircraft are expected to exhibit a decrease in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 trending crash rates." That's conclusory. It doesn't
2 help me much. It would be nice to see where did you
3 get that, what's the fact that supports it. But
4 that's the level of key determinations I'm looking for
5 - name the issue, give me the conclusion, and give me
6 the facts that lead you to that conclusion. Don't
7 give me just bare conclusions. It doesn't help, and
8 the Staff did some of those.

9 What I'm after is what's the conclusion
10 and how do you get there, because that's what you need
11 to do to analyze your case, it's what we need to do to
12 analyze your case, and it's what the other litigants
13 need to do to analyze your case.

14 MR. TURK: May I say in response, there's
15 always a difficulty in deciding how much detail to put
16 in or leave out.

17 JUDGE ABRAMSON: Right. And this is the
18 level of detail I'm looking for.

19 JUDGE FARRAR: Those two were good ones.

20 MR. TURK: For instance, new aircraft,
21 that's the kind of detail that would be in testimony,
22 but we'll make reference to it in the key
23 determination, so that if you want more details, you'd
24 go to the testimony to find why do we say that, how do
25 we reach that conclusion.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 JUDGE ABRAMSON: Okay. So I mean, that
2 was opinion.

3 MR. TURK: And I should point out in
4 fairness that not everything that you cited was agreed
5 to by the Board.

6 JUDGE ABRAMSON: I'm only looking at your
7 case.

8 MR. TURK: You're looking at the way we
9 structured --

10 JUDGE ABRAMSON: I like the way you
11 structured the case. That's what I'm looking -- not
12 saying whether I agree with it or not.

13 JUDGE FARRAR: My opinion, just a quick
14 review I did - those are two very - you know, not to
15 say others weren't, but those are two that jumped out
16 at us that gee, that's what we like. I mean, you
17 can't do that all the time, but --

18 MR. TURK: But we will have to be
19 conclusory in many regards, because otherwise we're
20 simply going to be restating everything that's in the
21 testimony.

22 JUDGE ABRAMSON: Well, if, for example,
23 you feel you have to be conclusory because Witness X
24 supports this conclusion by his professional opinion,
25 I think that's adequate for us. We can then look at

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Witness X's testimony and evaluate that, as can the
2 other side. But make the case in very succinct short
3 boards, like this does, and then everybody can assess
4 it. So that's what I'm looking for in key
5 determinations. And with that in mind, once you have
6 all filed written rebuttal, I would hope that within
7 some finite period, a couple of weeks, you could
8 prepare key determinations of that nature. Then we
9 can all have time to digest it and start the hearing.

10 JUDGE LAM: I do agree with Judge
11 Abramson's comments on what is needed. However, I do
12 share in Ms. Chancellor's concern. Make sure this
13 type of effort is commensurate with the amount of
14 resources that you have. You only have limited time
15 so you need to prioritize what is important for your
16 case.

17 MR. GAUKLER: And let me state a concern
18 also. The last time we had talked about the schedule
19 following the principle of the duration we had last
20 time, and with that I hoped to possibly, if the
21 Staff's review was done early enough to be done by the
22 Fourth of July, and I'm getting very concerned that
23 we're now extending, if the Staff's review sticks
24 where it is, and with all these things, we're greatly
25 extending the length of the time for concluding this

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 proceeding.

2 JUDGE ABRAMSON: If we look at all the
3 time periods we just discussed, we have seven and a
4 half, eleven and a half, fourteen weeks from the day
5 the Staff report is delivered to the day we would
6 commence hearings. And that, Ms. Chancellor, is
7 taking just for all of you ten days - you get the
8 Staff report, ten days later we begin discovery, four
9 weeks later we complete discovery, three and a half
10 weeks later we have written testimony with rebuttal
11 and other additional materials, two weeks later we
12 have written rebuttal materials, two weeks later we
13 have key determinations, ten days later we start the
14 hearing. I think those are all fair time periods that
15 are consistent with what we were just all discussing.
16 And it may be a week or two longer than you had last
17 fall. I don't know, Mike. Is this consistent?

18 JUDGE FARRAR: It may be a little longer,
19 but it -- I guess I look at it, there's been a long
20 time getting here.

21 JUDGE ABRAMSON: Well --

22 JUDGE FARRAR: And let me put it this way.
23 I sometimes was on panels where they had four speakers
24 and they each had an hour to present their panel. And
25 the first three speakers would take 19 minutes, and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 then you'd look at the fourth person - well, you've
2 got three minutes, and that's not right. The company
3 has taken a long time, the Staff has taken a long
4 time. It's the company's project so they can take as
5 long as they want.

6 We talked last time about whether we had
7 any authority to make the Staff go faster, and we
8 agreed we didn't, which is good because the Commission
9 had something to say a day later.

10 MR. GAUKLER: It was good that you did.

11 JUDGE FARRAR: It did make us happy we
12 reached that conclusion, so this is a very complicated
13 case. It's been complicated from the beginning. Mr.
14 Gaulker, not to pound on you all, but early on you
15 said it would be four weeks to do something, and it
16 was seven. You know, that's not your fault. This has
17 been no one's fault. We can't tell you to hurry, and
18 we can't tell the Staff to hurry, so when we get here,
19 we want to make sure that everybody has a chance,
20 having put all this effort into it - I mean, we've
21 been at this what was it, July, June? I mean, we're
22 talking eight or nine months. And so to take an extra
23 two weeks to get ready for a hearing so you can have
24 a good decent hearing with everybody not worn out,
25 with everybody having had a chance to digest the other

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 side's case so they're not punch-drunk walking around
2 the courtroom, and for us to have a chance to get
3 ready, I think is more effective. If we don't have a
4 good hearing, then our time to write an opinion drags
5 out because you don't get out of the hearing what you
6 need. And so I don't think Judge Abramson was saying
7 this is the way it has to be, but I think this
8 discussion was good in terms of these are things we're
9 thinking about. If you can do it better or faster,
10 fine. But the notion of deposing 15 panels of
11 witnesses in three weeks, you know, that's not going
12 to happen.

13 And the State's point that we've waited
14 all this time for an incredibly complex Staff report,
15 to say the State doesn't get a chance to read that
16 report before they go to depositions - I mean, that's
17 crazy. I'm not blaming anybody. We put this down,
18 and we all agreed to it. But when you think about it,
19 from the way the Staff report was described to us last
20 week, it hits the pavement and people have to read it.
21 Otherwise, why did we wait three months for a Staff
22 report?

23 MR. TURK: Your Honor may recall that the
24 origin of the schedule was not a Staff proposal, it
25 was conceived with the Commission's directive in mind

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 to expedite the proceeding. And it was also conceived
2 as an improvement over the previous concept in which
3 discovery would start before the Staff report came
4 out.

5 JUDGE FARRAR: Right.

6 MR. TURK: So we held off starting
7 discovery until the Staff report came out, and it
8 started immediately, which was deemed to be an
9 improvement over going through discovery without a
10 Staff report in hand.

11 JUDGE FARRAR: That reminds me - thank
12 you. What are we doing while we're waiting - in other
13 words, we now have two months between now and the
14 Staff report coming out. What are we doing to use
15 those two months?

16 MR. TURK: We're going to try to do
17 aircraft angles and speeds depositions before the
18 Staff report comes out on structure. That's one
19 concept that we talked about.

20 JUDGE ABRAMSON: Maybe the three parties
21 can discuss a schedule using what we've been
22 discussing at something to think about, and work in
23 these two months --

24 JUDGE FARRAR: That's a crucial point.
25 Now you have two months that's sitting there. I'm not

1 saying you can put it to 100 percent efficient use.

2 MR. TURK: Another concept that we talked
3 about today that might be useful is deciding are we
4 going to do anything on radiation and criticality, or
5 is that something that we'll leave off for another set
6 of hearings if the outcome of this hearing points to
7 a need for that, so we can decide that. And that may
8 cut down on the number of depositions and the number
9 of issues we have to address in the testimony. There
10 was another issue that the State and PFS had
11 discussed.

12 JUDGE FARRAR: And let me express, having
13 heard all that discussion earlier, if we want to move
14 quickly, then notwithstanding - I agree with Mr.
15 Soper's opportunity comment. If we drop those two
16 issues, then we move ahead. And if the company wins
17 on probability, we've saved all that time. If the
18 company loses on probability, we've got another
19 hearing coming up, but that's -- the State doesn't
20 like that because they're frustrated, but the company
21 doesn't like it either because now they've got more
22 time.

23 MR. GAUKLER: That's right.

24 MR. TURK: But it actually works to both
25 PFS' and the State's advantage in that sense. If PFS

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 is successful, then we don't have to reach that issue.
2 If the State is successful, it extends the date for
3 any possible licensing the facility, so at least
4 through an extension of the proceeding, they win that
5 way. And they'll get a chance to address the issue
6 substantively again.

7 JUDGE FARRAR: But let's make clear if
8 we're going to put that off, that we --

9 JUDGE ABRAMSON: It's only postponed.

10 JUDGE FARRAR: It's postponed. Everybody
11 agrees here's why we're doing it.

12 MR. TURK: I really think it's PFS'
13 decision to make. The Staff as been mentioned here,
14 is not preparing its own radiation dose analysis,
15 other than to look at what the State has done, to see
16 if the State has done it correctly. And if they're
17 right, those would be the results, if you get a whole
18 size as the State postulates. We're not doing our own
19 independent calculation of what aircraft consequences
20 would be in radiation dose.

21 MR. GAUKLER: And we're doing the same
22 thing. We're not doing any independent analysis.

23 JUDGE ABRAMSON: There was a question
24 raised by Mr. Soper, though, that perhaps, Mr. Turk,
25 you could address. And, Mr. Soper, correct me if I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 phrase this wrong, but it seemed to me you made a
2 comment to the effect that if there is a criticality,
3 it becomes a serious enough event that even if the
4 probability of that event is less than the credible
5 event probability, it still is required to be
6 analyzed. Did I hear that correctly from you?

7 MR. SOPER: That's my understanding.
8 There are some accident conditions that are
9 unacceptable regardless of the probability of 10 to
10 the minus 6, which is the probability for credible
11 events generally. One of those is criticality, and I
12 believe that the NUREG 1536 on the standards for
13 reviewing casks also requires that the containment
14 barrier not be breached at any time.

15 MR. TURK: If I can respond briefly, the
16 Staff understands the regulations to establish a
17 design-basis envelope. Any events which are within
18 the design-basis must be evaluated for their
19 consequences. If something, however, is so improbable
20 as to not be required to be within the design basis,
21 we would not have to evaluate the consequences of that
22 improbable event. And that would include things like
23 criticality or radiation doses for improbable events
24 that are not incredible enough to be design- basis
25 events.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. GAUKLER: That's our understanding too
2 of the regs requirements.

3 JUDGE FARRAR: Is there anything else you
4 all can do in this two month period? We've talked
5 about discovery. Is there any other --

6 MR. GAUKLER: We had talked among
7 ourselves of a couple of things that might be done.
8 I don't know whether the Staff would get the jet fuel
9 fire out earlier if it was kind of a separate one.
10 That was something -- to allow us either early
11 deposition or to allow the State to decide whether or
12 not it was going to really proceed in that issue. And
13 the other one the Chairman was going to check -- Mr.
14 Turk was going to check into is whether it might be
15 feasible to get the Sandia part of the report done
16 earlier than the Staff report.

17 I talked some with the State about PFS and
18 State doing depositions of their people prior to the
19 Staff's review. I said it was our preference to do
20 everything together, but if the schedule slipped
21 significantly, then we would probably want to try to
22 do that. The State said that they would probably be
23 adamantly opposed no matter what. I think I correctly
24 stated your position, Denise.

25 MS. CHANCELLOR: I'd leave out the

1 probably.

2 MR. GAUKLER: So it's something we may ask
3 for once we start putting these dates down. It's not
4 our preference either, but it's something we may ask
5 for.

6 JUDGE FARRAR: One other thing you had on
7 here was elimination of motions in limine. Is
8 everyone agreed, we can dispense with those? Now
9 subject -- I mean, you all know how we view these
10 things. If something really doesn't belong in the
11 case, then right, we'll throw it out. But if it's you
12 just don't -- you disagree kind of with the approach,
13 I think we granted very little the last time.

14 MR. GAUKLER: I would see motions in
15 limine be focused on areas that we felt were not
16 proper to be heard in this case, as opposed to, for
17 example, expert's testimony is unreliable and,
18 therefore, it should be struck.

19 JUDGE FARRAR: Right.

20 MR. GAUKLER: Well, the Board consistently
21 refused those type of motions, and I see no --

22 MR. TURK: I would agree with that, but
23 there may be a need, depending on what people put in
24 for their testimony to move to exclude things as
25 beyond the proper scope. And that did come up during

1 other parts of the hearing where, for instance, one or
2 the other party put in radiation dose consequences,
3 and the Staff moved to exclude it. Maybe PFS didn't.

4 JUDGE FARRAR: Exclude it in advance, are
5 you talking motions in limine in advance?

6 MR. TURK: Yes.

7 JUDGE FARRAR: Or after a person takes the
8 stand and --

9 MR. TURK: It happened after the testimony
10 was filed, we saw that they had addressed an issue
11 that was not, in our view, proper to be litigated, so
12 we moved against that.

13 JUDGE FARRAR: But that was one small
14 portion of about 12 - I mean, if there were 12 things
15 that were subjects of motion in limine, we granted one
16 of them. That's a slight exaggeration, but we don't
17 look -- I mean, we're looking for things that are
18 really outside the scope.

19 JUDGE LAM: Right. So the threshold for
20 granting it will be very high.

21 JUDGE ABRAMSON: We won't entertain
22 frivolous motions.

23 MR. TURK: I don't know that any motions
24 were frivolous, but some of them filed by my
25 colleagues had to do with whether a particular witness

1 was qualified to address the matters that he was
2 addressing. And I think that goes more to weight than
3 -- unless it's so obvious the man or woman should not
4 be addressing that piece of evidence.

5 Can I come back for one moment to
6 something that came up earlier, that was time limits
7 on cross examination. My own sensitivity on this
8 results from my experience in defending against
9 questions that are loaded with predicates or improper
10 characterizations of testimony. My sensors go off
11 when that happens and I object a lot if I hear a
12 question freighted with unnecessary prefaces that are
13 incorrect. So I think if we're going to establish
14 limits on objection time, that we should also direct
15 the parties that in their questioning, they should not
16 load into the question things that might be
17 objectionable. Because if they do, an objection to
18 something that's properly objectionable should count
19 against the time of the person who's doing the
20 examination.

21 JUDGE FARRAR: Without adopting your idea,
22 my impression, not necessarily adopting your idea - my
23 impression of the trial was the very best cross
24 examination was the very shortest questions. Stand
25 up, say calling your attention to such and such a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 page, ask the question, ask a series of short pointed
2 questions, and get the answers. Don't have the
3 convoluted predicates, so I'm not saying it's never
4 permissible, but I think - and this is another reason
5 to have a little more time before the hearing starts,
6 that you can -- the more time you have to think, the
7 more time you have to -- the better your cross
8 examination can be. And I'm sure he won't object to
9 me taking his name in vein in his absence, but what I
10 recall and I told our law clerks to go read this - was
11 Mr. Silberg's cross examination of Dr. Catlin on SUWA
12 B. My impression of it was that was magnificent. It
13 was short and pointed. The witness was very good, and
14 Mr. Silberg was very good.

15 Now granted, that's an easier issue to
16 cross examine on than seismic and aircraft, but I
17 think the style he used, I remember saying both for
18 how a witness should conduct himself, and how a lawyer
19 should ask the questions, that was a classic, so I
20 would encourage everyone to go look at that. There
21 were others that were also good, but that one was the
22 one that stuck in my mind.

23 Well, let's do this. It's late in the
24 day. It's passed six. Let's all - when we get this
25 transcript or you all taking notes, we'll all go back

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 and read it. We do have some time to think about
2 this.

3 JUDGE ABRAMSON: Maybe the three parties
4 can discuss this.

5 JUDGE FARRAR: The three parties discuss
6 it, and let us know when you want - say in another two
7 weeks.

8 JUDGE ABRAMSON: Well, we asked them to
9 get back to us with what they can do regarding
10 admission of TT within two weeks. Right?

11 JUDGE FARRAR: Right.

12 JUDGE ABRAMSON: So perhaps within that
13 time frame you can also talk about a schedule.

14 JUDGE LAM: March 9th.

15 JUDGE FARRAR: Tell you what, why don't
16 you focus on TT, because that has the possibility of
17 getting and simplifying the trial. What did we say,
18 March 9th on TT. Monday, March 15th on the schedule.
19 Not just schedule, but all the things we talked about
20 today, all the different techniques and options we've
21 talked about. What's your preference on those? If
22 you're in disagreement, let us know, and how does that
23 tie into a schedule.

24 JUDGE ABRAMSON: And also, what they can
25 do in the interim.

1 JUDGE FARRAR: Right.

2 JUDGE ABRAMSON: By then we will have
3 something a little longer than a month remaining until
4 we can expect the Staff report, if it's on the
5 schedule that Mr. Turk suggested, so that would be a
6 good time to try to tie things down.

7 MR. GAUKLER: Also, it would be the time
8 that Mr. Turk has suggested he may the aircraft crash
9 speed and angle so be focused on that.

10 JUDGE FARRAR: All right. Anything else
11 anyone has?

12 MS. CHANCELLOR: I do, Your Honor.

13 JUDGE FARRAR: Yes, ma'am.

14 MS. CHANCELLOR: My usual request, when
15 can the State expect to receive a response to its
16 January 2nd letter about safeguards determination on
17 these, our expert reports, that it's sent to the
18 Director of Office of Nuclear Security and Incident
19 Response.

20 JUDGE FARRAR: Yesterday. Mr. Turk.

21 MR. TURK: Mr. Stapleton is not here. The
22 last time we had a discussion on the telephone with
23 the Licensing Board, he indicated that NSIR Management
24 was preparing to respond to the State's letter. I
25 haven't seen or heard anything further on this, but I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 will contact Mr. Stapleton to inquire.

2 JUDGE FARRAR: Okay. And would you tell
3 him that -- would you show him the Board's order that
4 mentioned the Staff's promise in this regard, and the
5 fact that we're -- that this is a difficult matter, as
6 we've all learned today, with the phone. It's a
7 difficult matter for the State to deal with, and they
8 are a litigant in a proceeding. And we would like
9 them to have an answer as quickly as humanly possible.

10 MR. TURK: I will do that.

11 JUDGE FARRAR: Thank you. Ms. Chancellor,
12 anything else? Mr. Soper?

13 MR. SOPER: I think that's all we have,
14 Your Honor.

15 JUDGE FARRAR: Okay. Mr. Gaukler.

16 MR. GAUKLER: Nothing else, Your Honor.

17 JUDGE FARRAR: Mr. Turk, it's been a long
18 road to get to this point, but I think we're making
19 progress, and that we're going to have a hearing
20 that's going to be good and thorough, and which the
21 public can place reliance on the result, whichever way
22 it goes. So I think we have to keep our eye on that
23 goal, as well as on moving forward as quickly as we
24 can.

25 So thank you all. We will wait to hear

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 from you.

2 MS. CHANCELLOR: Thank you. Goodbye.

3 JUDGE FARRAR: Thank you.

4 MR. GAUKLER: Thank you.

5 MR. TURK: Thank you.

6 (Whereupon, the proceedings in the
7 above-entitled matter went off the record at 6:09
8 p.m.)
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE


This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission
in the matter of:

Name of Proceeding: Private Fuel Storage, LLC

Docket Number: 72-22-ISFSI

Location: Rockville, MD

were held as herein appears, and that this is the
original transcript thereof for the file of the United
States Nuclear Regulatory Commission taken by me and,
thereafter reduced to typewriting by me or under the
direction of the court reporting company, and that the
transcript is a true and accurate record of the
foregoing proceedings.



Rebecca Davis
Official Reporter
Neal R. Gross & Co., Inc.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com