

## NUCLEAR REGULATORY COMMISSION

Title: Private Fuels Storage, LLC

Docket Number: 72-22-ISFSI

Location: (telephone conference)

DOCKETED  
USNRC

April 1, 2004 (11:33AM)

Date: Tuesday, March 30, 2004

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Work Order No.: NRC-1402

Pages 14581-14653

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1 UNITED STATES OF AMERICA  
2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD

5 (ASLB)

6 \* \* \* \* \*

7 PRE-HEARING TELECONFERENCE

8 -----X

9 IN THE MATTER OF: :

10 PRIVATE FUELS STORAGE, LLC : Docket No.

11 (Independent Spent Fuel : 72-22-ISFSI

12 Storage Installation) :

13 -----X

14 Tuesday, March 30, 2004

15  
16 The above-entitled matter came on for  
17 hearing, pursuant to notice, at 1:30 p.m.

18  
19 BEFORE:

20  
21 MICHAEL C. FARRAR Chairman

22 PETER S. LAM Administrative Judge

23  
24  
25  
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Also Present:

SherVerne Cloyd

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Susan Lin

Robert E. Shewmaker

Michael Waters

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

1:33 p.m.

JUDGE FARRAR: We'll go on the record. This is a very important prehearing scheduling conference, the day we've all been waiting for in the Private Fuel Storage proceeding. This is Mike Farrar. I'm the Chairman of this Board. Judge Lam is with me here in D.C. Judge Abramson is traveling and is unable to call him, but we have his proxy. The court reporter is here with us in our chambers as is Susan Lin, our law clerk, and SherVerne Cloyd who is helping administer the proceeding. Who do we have for the company?

MR. GAUKLER: We have Paul Gaukler and Sean Barnett.

JUDGE FARRAR: All right. Welcome gentlemen.

MR. GAUKLER: Thank you.

MR. BARNETT: Thank you, Your Honor.

JUDGE FARRAR: For the state?

MS. CHANCELLOR: Denise Chancellor, Connie Nakahara, Jim Soper and Jean Braxton.

JUDGE FARRAR: Okay. Welcome to all of you. And for the Staff?

MR. TURK: Sherwin Turk and Laura Zaccari

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1 and with us are Jack Guttman, Michael Waters and  
2 Robert Shewmaker.

3 JUDGE FARRAR: Okay. Welcome to all of  
4 you. I think we are in a good position to make some  
5 progress. Before I want to commend the parties for  
6 two things, first the settlement of Contention TT  
7 which I think in the Board's judgment whatever the  
8 evidence would have revealed this is a good outcome  
9 recognizing the State's concerns and the Applicant's  
10 capabilities to deal with them and memorializing that.  
11 So again this is another example of how nice it is to  
12 be presiding over a proceeding like this where people  
13 can solve problems in a sensible fashion. We will, of  
14 course, do what we have to do to enter that  
15 settlement.

16 And then thank you for getting us in a  
17 timely fashion the competing schedules for the  
18 resumption of the PFS hearing. I think there may be  
19 at least four things we need to deal with today.  
20 First is this question of what is and is not going to  
21 be litigated, but then we would also like to hear from  
22 you on the other issues how we can best subdivide  
23 those into two, three or four main issues that would  
24 help us get our arms around the case.

25 Second, the number of witnesses you have

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1 on each of those issues and we are leaning seriously  
2 although we're open to be dissuaded to the notion of  
3 an overall allotment to cross examination time for  
4 each side to use as it sees fit. So let's tackle  
5 those and anything else that you all want to get into.

6 The first question then I guess is some of  
7 the difference in the schedule comes down to  
8 litigating or not the so-called radiation dose  
9 consequences and criticality matters. Ms. Chancellor,  
10 do you want to tell us why you believe those should --  
11 Well, let me state the case for anybody reading this  
12 transcript. There is one way to divide the aircraft  
13 accident part of the case is into three parts of a  
14 unified regulatory question, what's the probability of  
15 site impact which we decided, the probability of  
16 resulting cask breach which will be one of the issues  
17 in the hearing and then the third question, the  
18 resulting excessive radiation consequences. That  
19 would be the third step. Ms. Chancellor, do you want  
20 to tell us why you think that third step either the  
21 way I stated it or stated some other way should be  
22 litigated?

23 MS. CHANCELLOR: Certainly, Your Honor.  
24 I'd like to step back to when we were filing joint  
25 reports after you issued the decision on probability.

1 If you will recall in April 30 joint report, the State  
2 argued as it did in the March 31 report that PFS must  
3 amend its license application. It must undergo Staff  
4 review and that Utah has to file new contentions.  
5 Both the Staff and PFS took the position that  
6 consequences were not beyond the scope of Contention  
7 Utah K and that there was no need to file a new  
8 contention.

9 Then we get to the Commission's decision  
10 CLI-03-05 on May 28, 2003 and that dealt with PFS's  
11 appeal from your decision LBP-03-04. PFS appealed on  
12 three grounds, first that  $4.29 \times 10^{-6}$  was close  
13 enough, that the Board committed error with respect to  
14 the R factor and that the Board also committed error  
15 for failure to admit evidence that there would be no  
16 harmful radiation release if the site were hit.

17 The Commission rejected PFS's appeal that  
18 the Board erred in not admitting the evidence on  
19 consequences. It cited to the March 31 report that  
20 PFS and the Staff were both prepared to go forward  
21 with the consequences' proceeding and the Commission  
22 held the other two issues in abeyance because those  
23 two issues were fact-based, but more particularly  
24 because the Board had not completed its risk inquiry.  
25 Specifically the Board is still considering the

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1 consequences aspect or risk, the Commission said.

2 The Commission refers to the Board's  
3 ultimate determination of risk. That is after the  
4 consequences' ruling. The important language in CLI-  
5 03-05 is the following: "If PFS successfully  
6 demonstrates at the anticipated hearing that the  
7 posited crashes would not penetrate the cask or even  
8 if they did would be unlikely to cause release of  
9 dangerous levels of radiation. The overall risk is  
10 satisfactorily low." So the Commission said that it  
11 was holding two appeal issues in abeyance until the  
12 record was complete and available to it. That  
13 complete record as we read the Commission's decision  
14 includes whether there's going to be dangerous levels  
15 of radiation.

16 In May 29 prehearing - this was where we  
17 were back in D.C. after the mini-cask reconsideration  
18 issue - we got into a discussion as to whether the  
19 State could make its case through cross examination or  
20 whether we had to file expert reports. Mr. Gaukler  
21 made the point that if we were going to file expert  
22 reports such as those we used in the past by Dr.  
23 Resnikoff meaning consequences or if we're going to do  
24 something independently, the State needed to file  
25 those expert reports and give PFS the opportunity to

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1 review that.

2 I would like to note that the Intervenor  
3 has the burden of going forward with evidence to  
4 support its contention either through direct evidence  
5 or by cross examination. That's well established case  
6 law. It goes back as far as Limerick 1 NRC 153. Utah  
7 identified its witnesses on September 5, 2003. Utah  
8 filed its expert reports on September 18, 2003, on  
9 time as the Board had scheduled including reports by  
10 Dr. Thorne on criticality and Dr. Thompson on  
11 radiation dose consequences. Utah put substantial  
12 resources and efforts into finding those experts, into  
13 producing those reports.

14 Now if you want us to forego that effort,  
15 we believe that that is totally unfair. PFS and the  
16 Staff have had more than adequate notice of what the  
17 theory of the State's case is. The theory of our case  
18 is there will be penetration and there will be  
19 consequences in the form of unacceptable radiation  
20 doses and the potential for criticality. We believe  
21 that if those issues are not heard, it substantially  
22 affects our ability to present the best case that we  
23 can to the Board.

24 I would note that neither PFS nor the  
25 Staff has really accepted the Board's probability

1 ruling. The only reason we are here is because the  
2 State has brought forth these issues of penetration,  
3 dose and criticality. It was really only at the last  
4 conference call that PFS made it clear that it was not  
5 its desire to go forward with radiation and  
6 criticality.

7 If you look at the schedule, there's only  
8 a couple of weeks difference between trying radiation  
9 and criticality now. Whereas PFS will probably argue  
10 that it will take a year later on and in fact PFS has  
11 said it has no intention of putting on a case on  
12 criticality in the future. It intends to go to the  
13 Commission and make its case to the Commission that it  
14 doesn't need to do radiation and criticality.

15 Just because we have this ruling that we  
16 didn't have to file a contention, now we're in this  
17 situation where we had proceeded along the lines that  
18 this is how we structured our case and that it  
19 wouldn't be a level playing field if you allowed PFS  
20 or the Staff to shape the way they perceive the  
21 hearing. If you look at the issue of probability and  
22 consequences, the risk is probability times  
23 consequences. PFS is serious that there will be zero  
24 consequences. If they wish to stand on that theory,  
25 they do so at their peril. Our position is that there

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1 will be consequences and that's the case that we think  
2 we should have the ability to put on.

3 JUDGE FARRAR: Ms. Chancellor, that was  
4 very well presented. Let me ask you a question.  
5 Maybe the Company will tell us differently, but I  
6 thought the issue was their willingness at this point  
7 to concede that if they fail to show there would be no  
8 cask breach, that is, if we find that there would be  
9 a cask breach, that at that point they've lost because  
10 they have by not putting on any evidence at this  
11 juncture conceded at least for now that there would be  
12 sufficient consequences that we would call it a bad  
13 thing, a bad enough consequence, so they could not  
14 proceed with the facility. Am I missing something  
15 there, Ms. Chancellor?

16 MS. CHANCELLOR: Yes, you are, Your Honor.  
17 I think if you go back and read the transcript last  
18 time, Mr. Gaukler was so good. He wanted to certify  
19 to the Applicants that PFS -- I think this is a moving  
20 target here. We never really nailed it, never pinned  
21 this issue to the wall that PFS is not willing to  
22 concede - and you can ask them this - that if we  
23 prevail and show that there is penetration that they  
24 concede that there are consequences. What they say is  
25 "Well, maybe we can go back and find other

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1 probability. Look at some of those unanalyzed event  
2 probabilities."

3 And we feel also that it would -- Just a  
4 second. Sorry. I lost my train of thought. We feel  
5 that in order to make our case that we can make a  
6 better case if we show that there are radiation  
7 consequences and criticality. If the case is closed,  
8 that may tip the scale. Then you're also left with  
9 the lack of complete record that the Commission is  
10 expecting as it said in its May order.

11 JUDGE FARRAR: Okay. That's a good point  
12 to focus on. Are we dealing with two competing values  
13 here? On one hand, the Commission said as here and in  
14 other cases we want this case wrapped up. This has  
15 been going on a long time. We want it wrapped up  
16 quickly. That's partly a good way of doing business,  
17 but it's partly the historical Commission view,  
18 Congressional view, that companies are entitled to  
19 have these proceedings to have a decision on their  
20 application.

21 So to the extent that the Commission says  
22 wrap this up, get it over with, there is some culture  
23 behind that, and not unfairly, that is trying to make  
24 sure the Applicant doesn't get kept waiting for years  
25 and years unnecessarily. On the other hand, if the

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1 Company comes in and says "We don't mind putting off  
2 the bites here," yes, in a perfect world, you do all  
3 three together. But if we do them one after the  
4 other, the only person being hurt by the delay of  
5 putting the third bite off is the Company. Usually  
6 they are anxious to have all their bites quickly.

7 But there is this notion that they can  
8 always go back to the drawing board, revise their  
9 application. So how do you reconcile these two  
10 cultures, one that the Company is entitled to in a  
11 reasonably rapid decision and if the Company is the  
12 one that suffers by delay and if they want to bring  
13 delay on themselves, so be it?

14 MS. CHANCELLOR: I think this is a false  
15 dilemma, Your Honor. If we had gone through the  
16 traditional process, if PFS had amended its license  
17 application, if Staff had reviewed it and Utah had  
18 filed contentions, our contention would have  
19 explicitly stated that there would be a breach, that  
20 PFS has failed to demonstrate that the site is safe,  
21 that there would be unacceptable radiation  
22 consequences and potential for criticality. That is  
23 the contention that is at issue here.

24 JUDGE FARRAR: Okay, but aren't they  
25 conceding that for purposes of bite 2? If I'm

1 correctly understanding what the Applicant is going to  
2 say, they are going to say give us bite two and for  
3 present purposes, we will concede. We lose on bite  
4 three?

5 MS. CHANCELLOR: No, I don't think they  
6 are, Your Honor. I think that's maybe what we need to  
7 nail down because --

8 JUDGE FARRAR: Okay, then why -- Go ahead.

9 MS. CHANCELLOR: The culture is also that  
10 the Intervenor shapes its case. It goes forward with  
11 its case and then the burden shifts to the Applicant  
12 and the Applicant then has to defend against what the  
13 Intervenor comes forward with. What we have come  
14 forward with penetration, criticality and radiation  
15 doses.

16 To bifurcate this yet again gets us still  
17 back into the probability part of the hearing and not  
18 to the consequences. I've looked at the record. I've  
19 spoken with Mr. Gaukler. I do not believe that PFS  
20 concedes that if we show penetration ergo there is  
21 unacceptable radiation consequences.

22 JUDGE LAM: Now, Ms. Chancellor, this is  
23 Judge Lam. When you are talking about those  
24 consequences and criticality issues, presentations  
25 that you intend to make, are these related to

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1 scenarios that have probabilities higher than  $10^{-6}$  or  
2 are they some scenario that your experts are  
3 constructing that are below the probability threshold?

4 MS. CHANCELLOR: I think the cumulative  
5 probability, Judge Lam, on our penetration comes to  
6  $10^{-6}$ . I never know which way to go on  $10^{-6}$ , exceeds  $10^{-6}$ .  
7

8 JUDGE LAM: So you intend to present your  
9 case based on scenarios that have probability  
10 exceeding  $10^{-6}$  and demonstrate the consequences in  
11 terms of doses and criticality --

12 MS. CHANCELLOR: That is correct.

13 JUDGE LAM: -- are not acceptable.

14 JUDGE FARRAR: Ms. Chancellor, when you  
15 characterize the issue of whether this is probability  
16 or consequences, I don't have our March 10 opinion of  
17 a year ago in front of me, but I thought we had a  
18 footnote that said that second step could be --

19 MS. CHANCELLOR: I have it in front of me.  
20 It's footnote 110.

21 JUDGE FARRAR: -- that it could be  
22 characterized one way or the other depending on how  
23 you were generally describing the issue.

24 MS. CHANCELLOR: But if I could read the  
25 language. "Cask penetration was spoken on a few

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1 occasions of constituting part of the accident  
2 probability question when the accident is defined as  
3 cask breach by a crashing aircraft or on other  
4 occasions as part of dose consequences evaluation when  
5 the accident is defined as it most often has been here  
6 as the cask impact by such an aircraft." So your  
7 footnote makes it clear that it most often defined as  
8 cask impact and that --

9 JUDGE FARRAR: Yeah, but doesn't it --

10 MS. CHANCELLOR: -- and that the three  
11 part scenario is not as this has been used in this  
12 proceeding that was always talked about probability  
13 and consequences when we talked about bifurcating this  
14 at the beginning. In the motion in limine, it was our  
15 understanding that we would be able to put on a case  
16 on consequences. When we went to the Commission  
17 complaining about the standards, that the standards  
18 should be  $10^{-7}$  and not  $10^{-6}$ , part of the reason for  
19 rejecting that was because we didn't make a case on  
20 consequences.

21 JUDGE FARRAR: But that footnote --

22 MS. CHANCELLOR: At no stage have we yet  
23 gotten an opportunity to make our case on  
24 consequences.

25 JUDGE FARRAR: Another way of looking at

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1 that footnote is that it gives us the flexibility to  
2 define the case the way that makes the most sense and  
3 I guess my question would be given where we are now,  
4 does it make the most sense to take up question two  
5 separately because one of two things will happen. The  
6 Company will prevail on question two and because then  
7 the accident is improbable or incredible, we don't  
8 need to get to question three. They win conceding  
9 that if we ever got to question three you would  
10 prevail.

11 Or the Company loses on question two and  
12 then they seek to come back on question three. And we  
13 will have run a more efficient and shorter and more  
14 focused hearing now and that any delay brought about  
15 by having to wait another lengthy period to get to  
16 issue three is on the Company's head, but they brought  
17 it on themselves. They can hardly be heard to  
18 complain and now there's a further delay in this  
19 proceeding even though the Commission didn't want a  
20 delay. If they say to us in effect, we are happy to  
21 have the delay. Let's simplify this hearing and get  
22 it over as fast as we can.

23 MS. CHANCELLOR: Beg to differ, Your  
24 Honor. What we're talking about is two extra weeks in  
25 the schedule, three at most. That seems to me the

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1 most efficient way to run this proceeding. We have  
2 had experts on retainer for a couple of years now and  
3 you expect us to retain these experts with the  
4 expectation that maybe in another year we will get to  
5 criticality and radiation doses.

6 Furthermore, we have our marching orders  
7 from the Commission that it wants a complete record so  
8 that it can decide the entire panoply of appeals that  
9 it's going to get. I still keep coming back to PFS if  
10 it -- Let me make another point first. Certainly you  
11 are right. If PFS prevails on the penetration, that  
12 penetration doesn't come within the  $10^{-6}$  probability,  
13 but that's not preordained. That's what this hearing  
14 is all about. We shouldn't go into this hearing  
15 thinking that they are going to prevail on that issue.

16 JUDGE FARRAR: I can assure you --

17 MS. CHANCELLOR: Oh, I'm not criticizing  
18 you, Judge Farrar. I know you wouldn't do that. But  
19 we're going to have the opportunity at some stage to  
20 make our case and PFS will go to the Commission and it  
21 will argue. If it loses on penetration and we don't  
22 try criticality, it will argue "Oh, no, we can't delay  
23 another year and it will be too long before we can get  
24 our license."

25 JUDGE FARRAR: Suppose we extract it from

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1       them as a condition to only hearing part two that they  
2       would forego any interlocutory appeal on part two and  
3       turn back and now it's your turn to have your innings  
4       and do part three. Would that be a fair concession to  
5       ask of them if we were to disagree with you?

6               MS. CHANCELLOR: Depends on how well you  
7       nail them to the wall, Your Honor. I just don't think  
8       this issue has ever been nailed down. PFS always has  
9       the right to go to the Commission.

10              JUDGE FARRAR: Not if as a part of case  
11       management in getting this thing on the right track or  
12       tracks, we say we will do this. This makes sense if  
13       and only if the following conditions are adhered to.  
14       Now Judge Lam has something and then we'll ask.  
15       You've made an eloquent argument here for doing the  
16       whole case, but let's hear from Judge Lam for a  
17       moment.

18              JUDGE LAM: Well, Ms. Chancellor, if you  
19       are reasonably confident that the consequence from  
20       radiation doses and criticality are indeed related to  
21       likely accident scenarios which have probability  
22       exceeding  $10^{-6}$ , I think your case is solid. However,  
23       if radiation dose consequences and criticality are  
24       related to unlikely scenario which I would say way  
25       below  $10^{-6}$ , then perhaps this is not the right time to

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1 hear them. One analogy is I know for sure a meteorite  
2 strikes at that facility would release unacceptable  
3 radiation dose consequences and may even create  
4 criticality issue beyond imagination, but that  
5 probability is probably ranked at about  $10^{-10}$ ,  $10^{-12}$ .  
6 So there is no need to examine the radiation dose  
7 consequences for that scenario.

8 The key here I think is are your experts  
9 reasonably certain that the scenario related to  
10 radiation dose consequences and criticality are  
11 reasonably high by which I mean exceeding  $10^{-6}$ . If  
12 indeed they are, then I would certainly think they  
13 should be heard at this time.

14 MS. CHANCELLOR: Judge Lam, I think if you  
15 look at the expert reports that the State's has by  
16 very credible experts that they are confident that  
17 there will be penetration, that there will be  
18 unacceptable radiation release and that there will be  
19 the potential for criticality within the  $10^{-6}$  bounds  
20 or somewhere in that vicinity with respect to  
21 criticality. That is the case that we have presented  
22 to date.

23 I don't think that anybody has suggested  
24 that the State's reports are just a bunch of trash.  
25 That if you look at those reports, there are credible

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1 scenarios in there that show penetration. The problem  
2 we have here is PFS is going in one direction  
3 presenting their case with respect to unanalyzed event  
4 probabilities being less than  $10^{-6}$  and we're going in  
5 the other direction showing within  $10^{-6}$  there are  
6 these unacceptable consequences.

7 So we are going in diametrically different  
8 directions. We feel that we can make a very strong  
9 presentation that within acceptable bounds there will  
10 be penetration such that there will unacceptable  
11 radiation release and potential for criticality.  
12 That's our case of breach.

13 JUDGE LAM: Thank you.

14 JUDGE FARRAR: Ms. Chancellor, you've  
15 stated this very powerfully and eloquently for which  
16 we thank you. We're not surprised, but thank you for  
17 stating it. Mr. Gaukler, you've heard Ms.  
18 Chancellor's arguments. You've heard our questions.  
19 So we'll turn the floor over to you and during the  
20 course of your remarks, I hope you will address just  
21 what we do with the Commission mandate if I can  
22 paraphrase them "wrap this up by the end of 2003."  
23 How happy are they going to be if we say "Well, we  
24 think we'll wrap it up by 2004, but depending on how  
25 it comes out, we may have to have another proceeding

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1 in 2005." Is that inconsistent with the directions  
2 they've given us?

3 MR. GAUKLER: I think the Commission was  
4 focused on getting this case over as quickly as  
5 possible within a reasonable range. If we had known  
6 back last year that this part of the proceedings was  
7 taking so long, we probably would have requested the  
8 Commission to go ahead on the probability part of this  
9 case.

10 In terms of what we believe is  
11 appropriate, we believe it's appropriate to hear the  
12 structural issue at this point in time for various  
13 reasons. The same rationale that led the Board to  
14 exclude both the structural and radiological dose  
15 consequences in the spring of 2002 apprise here. It's  
16 premature to consider the criticality and radiation  
17 dose issues because if we win on the structural as the  
18 Board notes, the issue of dose and criticality is  
19 moot.

20 The State is not prejudiced in any way  
21 because if it's correct in terms of a breach of a cask  
22 with less than  $10^{-6}$ , its witnesses will establish that  
23 and then the litigation of the consequences will be  
24 another day, those consequences. At this point in  
25 time --

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1 JUDGE FARRAR: But they claim their  
2 prejudiced because they've put resources and effort  
3 into signing on these witnesses, working with them and  
4 they are ready to go and may be like anything in the  
5 law, you wait. That's why we have statutes and  
6 limitations. You wait too long and people go away or  
7 they are not interested or something. So they are  
8 saying that there's prejudiced to them from having  
9 gone ahead and now we say "It's nice that you went  
10 ahead, but just put all of that on hold for a year."

11 MR. GAUKLER: I don't think that's going  
12 to be the case in the sense that we'll be prejudiced  
13 too if we have to go ahead and present this part of  
14 the case when we don't think it's necessary at this  
15 point in time in terms of cost and expenses. That is  
16 part of the litigation of issues.

17 JUDGE FARRAR: So let me paraphrase what  
18 you just said. Are you saying that in terms of a  
19 Commission mandate to be efficient, we have two  
20 choices here? We can be real efficient on issue two  
21 and if you win, then we've done it as efficiently as  
22 possible. And if we go ahead with both issues, that  
23 could be inefficient because it could take a much  
24 longer time. Those are the easy cases.

25 How about the case where we go ahead, look

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1 very efficient on issue two, you lose and now we have  
2 to come back? The Commission will be able to say to  
3 us "That was an inefficient way to do things. You  
4 should have done the whole thing at once." Or are you  
5 willing to say that from your point of view, you being  
6 the people hurt most by delay, you're willing to  
7 accept the risk of that issue three delay?

8 MR. GAUKLER: We're willing to accept  
9 issue three delay, but we would probably take an  
10 appeal with respect to issues one and two up to the  
11 Commission before even thinking to go back to issue  
12 three. We feel that's the most efficient way to  
13 handle this case in terms of all three issues. As the  
14 Board noted in its decision, there is basically two  
15 approaches that you used in terms of this decision  
16 describing how an applicant could prove its case with  
17 a respect to credible actions.

18 Let me clarify. There is actually three  
19 as clarified in Dr. Cornell's report and there's  
20 really three quite distinct issues. One is the  
21 probability of a crash. Two is the structural  
22 consequences of a crash or would there be any breach.  
23 Three only if you go through the first two  
24 possibilities is the radiation dose consequences. We  
25 believe that the Board does not have before a complete

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1 record of radiation dose consequences.

2 Important to the Board before getting into  
3 this issue were two things. One is the Staff had done  
4 no report with respect to any type of consequences and  
5 the Board was loafed to go forth into the area of  
6 consequences without further detailed review of the  
7 Staff. The Board noted obviously that it's not  
8 compelled to go along with the Staff, but they found  
9 Staff analysis to be very useful.

10 If we go forward with radiological doses  
11 consequences here, you would go forward with no  
12 analysis by the Staff or PFS on its own. You would be  
13 limited to cross examination and some rebuttal  
14 testimony with respect to particular points raised by  
15 the State.

16 JUDGE FARRAR: Wait, but the State says  
17 this is their contention. They put you on notice that  
18 they were going ahead and I guess they would say shame  
19 on you for not having responded.

20 MR. GAUKLER: Well, I think that an  
21 applicant is entitled to set forth the position he  
22 thinks by which to go forth with his licensing  
23 position efficiently and expeditiously. In terms of  
24 the initial contention itself, the initial contention  
25 itself was one PFS had failed to evaluate or analyze

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1 whether various events are credible or not.  
2 Consequences were included in that in the fact that  
3 consequences as the Board knows are part of this  
4 unified single question albeit we approach it in  
5 discrete parts.

6 JUDGE FARRAR: Well, that last that you  
7 said Mr. Gaukler, you're going back to the original  
8 contention.

9 MR. GAUKLER: Going back to the original  
10 contention.

11 JUDGE FARRAR: Do you have that in front  
12 of you by any chance?

13 MR. GAUKLER: Yes, I do.

14 JUDGE FARRAR: Could you read it to me?

15 MR. GAUKLER: I was looking at the basis  
16 etc. Let me read the contention itself.

17 JUDGE FARRAR: Well, which ever part of it  
18 touches on what's in front of us now.

19 MR. GAUKLER: The contention is that the  
20 "applicant has inadequately considered credible  
21 accidents caused by external events in facilities  
22 effecting the ISFSI intermodal transfer site and  
23 transportation corridor along Skull Valley Road  
24 including the accumulative effects of nearby hazardous  
25 wastes in military testing facilities in the

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1 vicinity." So basically that's the contention and the  
2 basis of the contention was to point out that the  
3 State alleges that PFS failed to consider whether  
4 certain events were credible or if properly evaluated  
5 whether they were credible or not. It did not get  
6 into radiation dose or criticality albeit as Your  
7 Honor noted in your decisions last March, that's part  
8 of the unified question. But the focus of this basis  
9 was whether or not there was a credible event.

10 Now in terms of going back to what I was  
11 saying is I believe there are three basic issues  
12 involved in the ultimate unified question. We've  
13 litigated one. The record is complete. And that will  
14 be on appeal if and when we get up on these other  
15 issues. We have issue no. two now which we are  
16 litigating right now. We have reports by the State  
17 and PFS. We will have reports by the Staff very  
18 shortly. The record will be complete after we go  
19 through on that.

20 In terms of radiological dose and  
21 criticality, the Board will not have a complete record  
22 as we talked about in its initial decision March 10  
23 last year in two respects. (1) You're not going to  
24 have any independent Staff analysis of the issue  
25 because the Staff I believe concurs with PFS that it's

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1 not necessary to reach that issue because the  
2 consideration, the structural issue, was moot. (2)  
3 The nature of the record would not be fully developed.

4 JUDGE FARRAR: But haven't both you and  
5 the Staff ignored the Commission's instruction that  
6 this whole thing? They wanted a complete record and  
7 the whole thing wrapped up. I don't remember a  
8 footnote in their decision that said we want a  
9 complete record, footnote except insofar as the  
10 Applicant and the Staff deem that we don't need a  
11 complete record. They told us get a complete record.

12 MR. GAUKLER: You will have a complete  
13 record with respect to two issues. I think that both  
14 the Staff and Applicant believe that those issues are  
15 moot in consideration of the third. That at this  
16 point in time that's the most efficient way to proceed  
17 in terms of reaching the ultimate objective of the  
18 Commission, in terms of reaching the decision as  
19 quickly as possible, to get an answer back to the  
20 Applicant as quickly as possible and Applicant  
21 recognizes that if we go up on one and two without  
22 having litigated three and the Commission denies our  
23 appeal on one or two, we certainly have engaged  
24 extensive lengthy delay. What we do at that point is  
25 up to us, but the delay will be our fault at that

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1 point and nobody else's.

2 JUDGE FARRAR: I take it then you would  
3 reject my proffered compromise that if we just did two  
4 you would agree to forego an appeal if you lost until  
5 we litigated three.

6 MR. GAUKLER: That's correct, Your Honor.  
7 We would be afraid that we would get into another  
8 potential lengthy proceeding on the third issue. One  
9 reason the Commission I think directed the parties to  
10 go forward as it did without hearing the appeal was it  
11 thought that based on the decisions that have been  
12 filed by both PFS and State that consequences would be  
13 relatively simple to go forward and to be resolved  
14 relatively expeditiously.

15 As the Board and the parties have found  
16 out that's not been the case. I think that  
17 criticality and radiation dose if one would really get  
18 into it and look at closely would be just as  
19 complicated as the structural issues that proved out  
20 to be. PFS would much rather go forward with the  
21 issues that are forward and litigate it. The decision  
22 which we would agree would be favorable, but if it's  
23 not favorable, then we recognize that there would be  
24 delay in order to go back and litigate radiation dose  
25 and criticality or go back and redesign the cask or

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1 whatever option we may choose at that point in time.

2 JUDGE LAM: Mr. Gaukler, this is Judge  
3 Lam.

4 MR. GAUKLER: Yes.

5 JUDGE LAM: Assuming you are right that  
6 you would prevail on the probability of a structural  
7 integrity of the cask, assuming you are right,  
8 therefore those consequences and criticality results  
9 only would apply to accident scenarios which are  
10 deemed improbable and below a  $10^{-6}$  threshold. Now in  
11 that case, what harm would it be to your case by  
12 having only the results presented by the State? That  
13 should not help the case though, should it?

14 MR. GAUKLER: It doesn't harm our case in  
15 terms of albeit that structural integrity is probably  
16 at the breach of a cask is less than  $10^{-6}$ . If we were  
17 wrong in that case, we would have given up the ability  
18 to going back and presuming what we think their  
19 analysis show are incorrect results in the State  
20 analysis, etc.

21 JUDGE LAM: I see. So that is your  
22 concern.

23 MR. GAUKLER: I believe that in terms of  
24 the approach that is implicitly recognized by the  
25 Board in its initial decision of those kind of steps

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1 or approaches in this process and that involves that  
2 there are three steps or approaches in this process,  
3 that it makes sense to look at those steps  
4 individually before going forward to the next one.  
5 The whole question of what type of consequences you  
6 would get from a breach is not yet defined. It seems  
7 to be not an efficient use of resources.

8 It would be much better to define what you  
9 think the nature of the breach might be before you  
10 went in and tried to determine the consequences in  
11 terms of radiation dose and criticality. But do all  
12 those reasons suggest for us to go forward and do the  
13 structural integrity and it would be the most  
14 efficient way to enable a decision born within the  
15 least time is one that PFS then if it were not to  
16 prevail would in all likelihood, 99.9 percent, take  
17 the first and second decision up on appeal.

18 As a licensee we would have the right to  
19 come back and change something either in terms of the  
20 design or seek to litigate those at some point later  
21 in time. But we recognize that if we lose on issues  
22 one and two as delay is laid out at our boots or laid  
23 it out as our doorstep.

24 JUDGE FARRAR: Let me ask you this, Mr.  
25 Gaukler. Would it be a sensible compromise to say

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1 "All right. We'll just litigate issue no. two, but  
2 we're going to allow the State to put on the record  
3 what it thinks the results on issue no. three would  
4 be. We would make no finding of course that that's  
5 what would happen on issue three if we ever got to  
6 issue three. But this would allow them to spread on  
7 the record the work that they have done thinking they  
8 were getting ready for litigation.

9 Obviously we have to be very careful in  
10 how we spell that out. You know the Company lost  
11 issue one, but that's subject to appeal. We're now  
12 litigating issue two and one of the reasons we're  
13 litigating issue two is the State has this concern  
14 that if the accident were credible, here is what the  
15 State thinks the consequences would be. Now that's  
16 not what the Board necessarily thinks. We've not  
17 gotten to that yet, but that would give them a chance  
18 to put the work they've done on the record. Would  
19 that be a fair approach?

20 MR. GAUKLER: I would hate to have it put  
21 on the record. It's already part of the docket for  
22 the proceeding and it's already part of the record in  
23 that broad sense of the word. To put it in the  
24 evidentiary record I think would not be appropriate.

25 JUDGE FARRAR: Not so much the -- It would

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1 be not part of the evidentiary record, but it would be  
2 given some status beyond the fact that they have  
3 submitted it and exchanged it with parties. There  
4 would be some recognition taken that this is the  
5 position they will take if and when we ever get to  
6 issue no. three.

7 MR. GAUKLER: I think that's inclusive  
8 already in the fact that they gave it to the Staff and  
9 we'll filed it with the Board albeit it was exchanged  
10 with the parties on this case. We have put it on the  
11 docket and it's essentially part of the docket I  
12 guess. I have no problem with that.

13 JUDGE FARRAR: But you wouldn't want to  
14 see any particular note taken of it at the hearing to  
15 give it some quasi-more exalted status.

16 MR. GAUKLER: No, Your Honor. I don't  
17 think so. No.

18 JUDGE FARRAR: All right. Mr. Gaukler,  
19 you also have made an eloquent and forceful statement  
20 of the Company's position and responded well to our  
21 questions. I'll give you an minute if you have  
22 anything else to add, but then I'd like to turn and  
23 ask the Staff what its view is.

24 MR. GAUKLER: I think I've addressed all  
25 of the main points I wanted to make. I think I

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1 responded to the Board's questions. If I haven't, I  
2 certainly --

3 JUDGE FARRAR: You'll probably get --

4 MR. GAUKLER: More I'm sure.

5 JUDGE FARRAR: Our usual custom. You'll  
6 get another chance. Thank you very much, Mr. Gaukler.  
7 Mr. Turk, you've heard the arguments. Is Mr. Gaukler  
8 correct that the Staff has done no review or no  
9 analysis of the State's issue three reports?

10 MR. TURK: He's partially correct. We  
11 have not done our own analysis of what would be the  
12 radiation doses consequences if a breach of the cask  
13 occurred. We have however looked at what the State  
14 presented and if we had to, we would be prepared to  
15 rebutt them. But we don't think that it would be  
16 appropriate to have to do that. I would like to lay  
17 out my reasoning if I may.

18 JUDGE FARRAR: Yes, go ahead.

19 MR. TURK: (1) I have to recognize from  
20 the outset that we are not on a secure telephone so I  
21 can't go into any details about the methodologies or  
22 the analyses or the results of the analyses. So I  
23 will stay away from that. You have to read between  
24 the lines when you listen to my comments to understand  
25 the Staff's position on issue no. two as to whether or

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1 not there is a breach of the cask.

2 We believe that there is no reason at this  
3 point to get to issue no. three. We will be  
4 publishing our report in approximately three weeks and  
5 you'll be able to see the details of our analysis as  
6 well as our evaluation of what PFS has done and what  
7 our evaluation of what the State had presented. Based  
8 on my conversations with the technical staff, I think  
9 that the Staff report will be comprehensive and  
10 persuasive.

11 I think we never have to reach the  
12 question that the State wants to get to also as to  
13 what are the radiation dose consequences of a breach  
14 of a cask. In our mind, that's a hypothetical case  
15 that is beyond the design basis that need not be  
16 addressed.

17 JUDGE FARRAR: Okay. How do you square  
18 that position with the absence of a footnote when the  
19 Commission said wrap this case up. Get a complete  
20 record. I didn't see a footnote other than on those  
21 matters that the Applicant and Staff choose not to  
22 litigate now.

23 MR. TURK: I don't have the Commission's  
24 decision in front of me.

25 JUDGE FARRAR: You do concede it did not

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1 have a footnote of that nature attached to it.

2 MR. TURK: That's correct. But it also  
3 has a statement that Ms. Chancellor in which as I  
4 understand the reading the Commission indicated that  
5 the Applicant is free to make a case that the aircraft  
6 crash will not penetrate the cask or even if it did,  
7 it would not have significant radiation dose  
8 consequences. There would be no significant radiation  
9 consequences of that event.

10 The Commission did not require as I  
11 understand Ms. Chancellor's reading of their decision  
12 that PFS put on a full case that addresses both the  
13 lack of structural consequence as well as a  
14 hypothetical case where if one assumes a structural  
15 consequence, what would be the dose consequence of  
16 that?

17 JUDGE FARRAR: That sentence you just read  
18 was not followed by a sentence that said "Of course,  
19 the Applicant can do A or B or it can do A and wait  
20 and see how it makes out and then it can do B later."  
21 It didn't say that, did it?

22 MR. TURK: No, it did not instruct the  
23 Applicant which way to proceed nor does the licensing  
24 board. The important point to keep in mind is that  
25 the issue before the Board is is the facility safe to

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1 license. The normal way in which the Commission  
2 evaluates risk is to look first at the probability of  
3 an event occurring and as Judge Lam noted that if the  
4 probability is below a certain level so as to be  
5 incredible, you never have to reach the question of  
6 what are the dose consequences of some incredible  
7 beyond design basis event.

8 So to take the State's approach would be  
9 to disregard 30 years of Commission licensing  
10 proceedings both before licensing boards as well as  
11 Staff and Commission actions where there is no  
12 contested proceeding where the only evaluation of  
13 those consequences that have to forward is of credible  
14 accidents. So unless the case can demonstrate that a  
15 credible event involved with structural breach, there  
16 would be no reason to reach the second question or in  
17 this case the third question on what are the dose  
18 consequences of that hypothesized event.

19 JUDGE FARRAR: That would ordinarily be  
20 the case in Judge Lam's meteorite example. If you  
21 can't show there's a high probability, we don't waste  
22 our time on consequences. But this is an unusual case  
23 that the Commission has noted has gone on a long time.  
24 So why wouldn't this case be the exception to that 30  
25 years of culture and history?

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1 MR. TURK: The Commission has not said  
2 that this case presents any reason to go outside of  
3 the normal way of addressing safety questions. All  
4 they said is the case has gone on for a long time.  
5 Let's get it over with. That doesn't instruct anyone  
6 how to make the case that has to be considered now.

7 But then let me address in terms of would  
8 the State's approach help us to get the case over with  
9 quickly or not. I disagree with the State. They say  
10 that there would only be a one or a two or a three  
11 week difference in schedules if we litigate those  
12 consequences now. That's not correct.

13 The only thing that would only take two or  
14 three weeks additional time would be rebutting the  
15 State through cross examination and showing perhaps  
16 through rebuttal witnesses why the State's analysis is  
17 incorrect. That would not put you in position where  
18 you have either a PFS or a Staff analysis showing what  
19 would be the actual dose consequences of some  
20 hypothetical breach of the cask.

21 Even the State's analysis - I don't know  
22 if you'd have opportunity to read it yet - does not  
23 link a breach of the cask with any particular dose  
24 consequences. They hypothesize. They start with an  
25 assumption of a hole size of some amount without

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1 showing that hole size would result from an aircraft  
2 crash. So even the case that they wish to make to you  
3 is a hypothetical case that would not help you decide  
4 whether this facility is safe to license or not. So  
5 you would advance nothing by taking their case under  
6 consideration and in fact to make a complete record  
7 you could probably have to wait now for PFS and the  
8 Staff to go back and do lengthy analyses of some  
9 structural event that could breach a cask and look at  
10 what would be the consequences of that particular  
11 breach. But even that would be a hypothetical case.  
12 It would have no value to you unless you find that  
13 that breach would occur.

14 JUDGE FARRAR: You know Ms. Chancellor is  
15 going to say when it's her turn next, Mr. Turk, "God  
16 help the State if six months later they said 'Oh we  
17 forgot to do something. Give us some extra time to do  
18 our analyses so we can get ready for the hearing.'"  
19 She's going to say that that right was never given to  
20 her in this entire proceeding. So how would you  
21 respond if she were to say that?

22 MR. TURK: I would say there's no  
23 foreclosing of the State's opportunity later to make  
24 out a case on radiation dose consequences if the Board  
25 or the Commission find that a breach of the structure

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1 happens.

2 JUDGE FARRAR: No, maybe I didn't make my  
3 anticipation of what her argument would be clear. If  
4 we decide that we're going to litigate issue two and  
5 issue three now, you're telling me the Staff and the  
6 Applicant will put up their hands and say "Oh, we have  
7 to have some time now to do our preparation" and Ms.  
8 Chancellor's going to say "The State was never given  
9 any such opportunity at any phase of this proceeding  
10 to say oh we forgot to do something. Let us go back  
11 and do it again." What's my answer to her supposed to  
12 be?

13 MR. TURK: Well, I'm trying to picture  
14 that scenario and I have a hard time imagining that  
15 that argument would come before you. If the Board  
16 found that there were to be a structural breach, I  
17 think all parties then would go --

18 JUDGE FARRAR: No, Mr. Turk. Let me say  
19 it again. Please listen and answer what I'm asking  
20 you. If we say today that we're going ahead with  
21 issue two and issue three, I think you said to me that  
22 there wouldn't be just a little delay in the hearing  
23 time. The Staff and the Applicant would need time to  
24 go prepare some reports. The instant you and Mr.  
25 Gaukler say that Ms. Chancellor is going to put up her

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1 hand and say "Wait a minute. Whenever the State fell  
2 behind, whenever the State didn't do anything, they  
3 didn't get to put up their hand and say 'Hey, give us  
4 another chance. We forgot to do our reports or we  
5 forgot to file a pleading. Give us some weeks or  
6 months because we didn't do what we had an opportunity  
7 to do.'" What would the response to that be?

8 MR. TURK: First, let me say you're right.  
9 I did misunderstand your question. If the Board were  
10 now to say we want to go forward with those  
11 consequences, you would do that because the State is  
12 pushing that decision. The State would be requesting  
13 that you consider that issue.

14 PFS when it submitted its initial report  
15 did not present that issue for your consideration.  
16 The State is the one that raised it when they issued  
17 their responsive report and they came back with a  
18 report saying here would be dose consequences.  
19 Neither PFS in its submittals to the Commission nor  
20 the Staff until now have said that that's an issue  
21 that requires your consideration. So if the State was  
22 to make that argument, a fair response could be that  
23 until now only the State thought this issue had to be  
24 litigated. Only now that the Board has adopted the  
25 State's suggestion, should other parties now be

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1 required to address it. Merely because the State  
2 addressed it on its own does not mean that other  
3 parties are required to address it until the Board  
4 says this is an issue that must be addressed.

5 JUDGE FARRAR: All right. Go ahead, Mr.  
6 Turk.

7 MR. TURK: Thank you, Your Honor. I'm  
8 sorry. Just one minute please.

9 JUDGE FARRAR: Go ahead. Mr. Turk, while  
10 you're collecting your thoughts, give us a moment here  
11 also. All let you know when we're back on. Off the  
12 record.

13 (Whereupon, the foregoing matter went off  
14 the record at 2:30 p.m. and went back on  
15 the record at 2:31 p.m.)

16 JUDGE FARRAR: Okay, we're back on. Go  
17 ahead, Mr. Turk.

18 MR. TURK: Thank you, Your Honor. I think  
19 I've addressed all the points that I've wanted to. I  
20 would sum up, however, to indicate our view that if  
21 you do accept the state issue now, then you would, in  
22 effect, be setting a new precedent in which beyond  
23 design basis events would have to be considered for  
24 their -- those conferences, and that would be contrary  
25 in our mind, as to how the Commission licenses the

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1 facilities and it would be contrary to any other  
2 proceedings in which they see issues are evaluated in  
3 terms of whether they present a credible event or not.

4 JUDGE LAM: Mr. Turk --

5 MR. TURK: We, in this case, as far as the  
6 Applicant can see, this is an issue that need not be  
7 addressed and should not be addressed at this time.

8 JUDGE LAM: Mr. Turk, this is Judge Lam.  
9 I'm so glad you raised that issue. Remember earlier  
10 in this in phone conference, I specifically asked Ms.  
11 Chancellor two questions. Are these events that they  
12 are dealing with, radiation dose consequences,  
13 criticality 4 within  $10^{-6}$  range of probability of  
14 occurrence and twice, her response has been positive,  
15 yes, they are.

16 If indeed, the State of Utah is asserting  
17 they are not beyond design basis accident, then may I  
18 hear from you why we should not listen to what they  
19 have to say?

20 MR. TURK: If she eventually succeeds in  
21 that argument before you, before her presentation of  
22 evidence, and you conclude that yes, this is a  
23 credible event, then the issue of what are the dose  
24 consequences of that event should be evaluated.

25 But in view of the fact that the other

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1 parties disagree with her assertion and urge you to  
2 find that in the event this -- in the event you find  
3 this to be a credible accident, there is still time  
4 then to look at the dose consequences. And it would  
5 be wasteful to go ahead and assume that now without  
6 having proof on the issue. Then I think it would be  
7 inefficient and a waste of resources for us to have to  
8 address that issue now.

9 JUDGE FARRAR: But it wouldn't run afoul  
10 of what you said a couple of minutes ago. I'll  
11 rephrase it. It would not afoul of what you said a  
12 few minutes ago, that we would suddenly for the first  
13 time be saying you have to look at the consequences of  
14 design basis accidents. All we'd be saying is that we  
15 choose to litigate at this time the consequences of  
16 what might prove to be a design basis accident.

17 Obviously, you're correct that if it's not  
18 a design basis accident, we don't worry about the  
19 consequences. But we don't know that yet and the  
20 accusation that we are suddenly departing from 30 or  
21 50 years of precedent and considering consequences of  
22 non-design basis accident is not really a fair  
23 statement of where we are at this moment, is it?

24 MR. TURK: Oh, I think it is. Because any  
25 Intervenor can always say that some accident they

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1 hypothesized is a credible event and you should look  
2 at the dose consequences of that event.

3 But unless you first find that it's a  
4 credible event, there's no reason to take the second  
5 step.

6 JUDGE FARRAR: And you think that by  
7 saying okay, we're just going to Issue 2 now, and not  
8 take up Issue 3, notwithstanding the language the  
9 Commission used, they would think that was good case  
10 management?

11 MR. TURK: I certainly do. And let me  
12 make one other point which I made before, but perhaps  
13 not clearly enough. Even the State's report, even the  
14 evidence that they wish to present to you, does not  
15 show you that the -- that an aircraft crash will have  
16 any particular dose consequences.

17 The case they make out is totally  
18 hypothetical. They start out assuming certain hole  
19 sizes and saying what are the consequences if you had  
20 a hole size of such degree. But they don't make the  
21 link between the air crash crash event in any  
22 particular hole size even if they're right in  
23 theorizing that there would be a breach.

24 JUDGE FARRAR: So you're saying they're  
25 just basing their analysis of Issue 3 up to this point

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1 on the inventory of the rods as opposed to any  
2 particular accident freeing up that inventory?

3 MR. TURK: In a nutshell, yes. So you  
4 really won't have much of a record to base a decision,  
5 if you take their evidence and even if you agree with  
6 their evidence. You would still have to go back and  
7 ask the parties, all right, what are the real  
8 consequences of an aircraft crash assuming a breach of  
9 a particular degree with a certain hole size that you  
10 find to be credible.

11 JUDGE LAM: Now Mr. Turk, since the state  
12 has done all of the work and assuming we adopt your  
13 approach, will we hear what is the subject integrity  
14 issue and the likelihood of occurrence first. Can  
15 than -- if right in the middle of the hearing, let us  
16 say two weeks into the hearing we are persuaded that  
17 yes, indeed, these are likely events, using your  
18 approach, we would not be able to hear further  
19 evidentiary presentation? We have to wait.

20 MR. TURK: Are you asking whether you  
21 could then proceed to hear the state's case?

22 JUDGE LAM: That's exactly right. Let us  
23 say two weeks into the hearing, we are persuaded by  
24 the state's presentation, aha, the bridge size is  
25 commensurate with the probability of occurrence, that

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1 they assert.

2 Would your approach be not be right to  
3 hear what the state had to say in terms of  
4 consequences?

5 MR. TURK: If we follow that approach, the  
6 parties would not be ready to either put on the  
7 evidence or to address that evidence, if we proceed in  
8 what I believe to be the logical manner now, Issue 3  
9 now.

10 JUDGE LAM: My understanding is both the  
11 Staff and the Applicants are not ready to address  
12 Issue 3.

13 MR. TURK: That's correct. We're not  
14 ready now. We would not be ready if we were called in  
15 the middle of hearing.

16 JUDGE FARRAR: Mr. Turk, going way, way  
17 back in the administrative record of this case, before  
18 there was ever a hearing, I seem to recall the Staff  
19 trying to get the Applicant to address issues 2 and 3,  
20 2 and/or 3, a long, long time as part of the review of  
21 the initial application and the Applicant declining to  
22 do so.

23 One, is my recollection right? And two,  
24 is the Staff's current position inconsistent with that  
25 position?

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1 MR. TURK: I don't think your recollection  
2 is quite accurate. I believe what we did is we said  
3 that in light of the Commission's decision that PFS  
4 should now -- is now permitted to and should proceed  
5 to litigate those consequences. I'm sorry, the  
6 consequences of an aircraft crash should they choose  
7 to do that, we didn't say that PFS should address the  
8 consequences in any particular manner. We did not  
9 preclude the idea that they might be able to take Step  
10 2 before going to Step 3 and maybe avoiding having to  
11 go to Step 3 all together.

12 JUDGE FARRAR: And that position is or is  
13 not consistent with the position of many years ago  
14 where administratively you asked them to deal with  
15 consequences and they said ah, we don't need to?

16 MR. TURK: None of us in this room recall  
17 that we ever asked them to look at those consequences  
18 of an aircraft crash.

19 JUDGE FARRAR: I thought we made reference  
20 to that in the part of our March 10th opinion  
21 reviewing how the consequences issue had and had not  
22 been framed over the years. That may have been wrong.

23 MR. TURK: My recollection is that there  
24 was really a two-part process envisioned at that time.  
25 One probability and two, consequences. But at the

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1 time when we looked at probability we were equating  
2 the site impact probability which probability of  
3 capped breach. PFS instead of following that Staff  
4 assumption and perhaps that was a Board assumption,  
5 has introduced Step 2. And that's not inconsistent  
6 with our thinking before. We just hadn't expressly  
7 laid out a process to follow.

8 JUDGE FARRAR: What do you think of our  
9 suggestion that if we side with the Staff and the  
10 Applicant on this issue that the state gets to put  
11 forward in some fashion, not as evidence, not anything  
12 we would make a ruling on, but put forward in some  
13 fashion their position on consequences. It would get  
14 some sort of recognition that that work had been done?

15 MR. TURK: Your Honor, I'd like to address  
16 that later by looking at specific options that you  
17 might have in that regard.

18 I certainly think it would be wrong to do  
19 it as part of the evidentiary record.

20 Perhaps in a footnote of a decision that  
21 you issue ultimately, you could take note of the fact  
22 that the state was prepared to reach that issue, but  
23 you also would have to recognize the nature of the  
24 case that the state wanted to put before you, which as  
25 I indicated is not a demonstration of the consequences

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1 of any particular aircraft crash, but a hypothetical  
2 breach.

3 JUDGE LAM: Now, Mr. Turk, what harm would  
4 it do if the state put it as part of our evidentiary  
5 record, the consequence and criticality analysis that  
6 they have done? The facts stand as they are. If the  
7 state is wrong, they're wrong. If they're right,  
8 they're right. And can we accept it as evidence  
9 saying both the Staff and Applicant reserve the right  
10 to respond to this evidence when and if it's  
11 appropriate for them to do so?

12 What harm would it do?

13 MR. TURK: Your Honor, there are a number  
14 of flaws in what the state is presenting to you. What  
15 you see addressed, if we had to respond to their  
16 testimony or to their report on that issue, but even  
17 if you assume that the state had a proper analysis,  
18 you still would not have a record upon which you could  
19 rely to say what would be the consequence of an  
20 aircraft crash, because the other parties would not  
21 put on evidence and you would not have you before any  
22 evidence of the consequences of any particular  
23 aircraft crash.

24 JUDGE FARRAR: But Judge Lam's question  
25 was you would just say here it is, we're not ruling on

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1 it. We're not accepting or rejecting it because the  
2 Applicant and Staff have reserved their right to  
3 respond, if and when that ever becomes appropriate?

4 MR. TURK: Your Honor, that would have no  
5 apparent benefit and it would seem to me to be  
6 contrary to the principle that Judges should not try  
7 to reach declaratory judgment.

8 The issue before you is what are the  
9 consequences of an air crash at the site. PFS is  
10 going forward and saying there is no breach. Until  
11 you reach decision on whether or not there's a breach,  
12 there's no reason to reach declaratory judgment of  
13 what would be the consequences if hypothetically we  
14 assume a breach and hypothetically we assume a certain  
15 breach and type and size. I mean that's going off  
16 into reaching unnecessary judgment.

17 MR. TURK: Well, you know -- my training,  
18 at least, is contrary to judicial precedent.

19 JUDGE FARRAR: Maybe I'm not making myself  
20 clear today, but the last word I ever would have used  
21 is making any judgment. I think I specifically said  
22 we would not be making any judgment.

23 I think we've beaten this one up enough.  
24 We've got to get moving here.

25 Ms. Chancellor, I'll give you a couple of

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1 minutes to respond to what you've heard from Mr.  
2 Gaukler and Mr. Turk.

3 MS. CHANCELLOR: Of course, Your Honor,  
4 every ones into the hearing thinking that they will  
5 prevail on the evidence that they present and PFS and  
6 the Staff seem to think that it's a foregone  
7 conclusion that we won't have to get to consequences.

8 It appears that we have to under PFS's and  
9 Staff view that we have to prove credible accidents  
10 twice, first -- in the first hearing we had, we proved  
11 credible accident. They want a second hearing so that  
12 we have to prove credible accidents again and then and  
13 only if we prevail on that issue do we get to  
14 consequences.

15 Conversely, if we had not raised  
16 criticality and consequences, now I am sure the  
17 argument would be well, the state hasn't shown that  
18 even if there is penetration that there are  
19 consequences. Getting back to shifting sands of time  
20 --

21 JUDGE FARRAR: Wait, wait, wait, Ms. --

22 MS. CHANCELLOR: -- original contention  
23 and what was contained in the original contention.

24 JUDGE FARRAR: Ms. Chancellor --

25 MS. CHANCELLOR: -- I draw the Board's

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1 attention to the April 30th second joint report where  
2 PFS admits or it did at that time, PFS states that the  
3 issue of consequences itself was not beyond the scope  
4 of the contention, in response to the state's  
5 assertion that it had to file a new contention.

6 I believe this is just a -- that this is  
7 not an issue of whether the consequences are in or out  
8 of the hearing.

9 JUDGE FARRAR: Ms. Chancellor -- wait a  
10 minute, Ms. Chancellor, let me back you up a second to  
11 what you had said previously.

12 You're suggesting that if you hadn't  
13 brought these reports in and you went and you --

14 MS. CHANCELLOR: The issue that PFS and  
15 the state that I'm now talking about --

16 JUDGE FARRAR: And if the company --  
17 you're not suggesting the Staff and Applicant would  
18 have argued that you are foreclosed and therefore lose  
19 on the overall unified issue because you never showed  
20 there were any radiological consequences?

21 MS. CHANCELLOR: You've got it exactly.  
22 I mean the standard that the state has to meet shifts,  
23 depending on what the Staff and PFS's position is. It  
24 seems that like whatever it is we get the worst end of  
25 the stick.

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1                   With respect to the issue of what the  
2                   Staff was expecting of the Applicant, and the  
3                   arguments of the motion in limine, you were asking,  
4                   Ms. Markle about what would happen if there was a  
5                   credible accident. If the probability exceeds the  
6                   threshold, then either the consequences would have to  
7                   be determined to see if there was no regulatory limit  
8                   or, on the other hand, if not, the Applicant would be  
9                   required to have in its facility to be able to  
10                  withstand the event.

11                  So in other words, the consequence, Ms.  
12                  Markle admitted that the consequences would have to be  
13                  determined to see if they exceed the regulatory limit.  
14                  We are talking about consequences and your offer of  
15                  putting on the state's testimony with respect to its  
16                  radiation case, with all due respect, I think that  
17                  just elevates form over substance. What it does is it  
18                  finds us for a year. The Board doesn't make any  
19                  finding.

20                  It may be -- it just doesn't -- I don't  
21                  think that is a starter, Your Honor, because if we're  
22                  going to put on our case, we want a ruling on that  
23                  case and we don't want any sort of feel-good  
24                  presentation or advisory opinion that the state put  
25                  this case on and just leave it at that.

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1 With respect to there not being a complete  
2 record, another false dilemma, PFS and Staff have  
3 chosen to rest on their laurels that the way they  
4 intend to present the risk aspect of the case is to  
5 show that there are zero consequences.

6 The Commission, when it issued its CL-03-  
7 05 decision, it relied on both PFS and the Staff  
8 saying that they were prepared to go forward on the  
9 proceedings on consequences, citing the March 31 joint  
10 report that the parties submitted to the Board.

11 And if you closely read the Commission's  
12 decision, it is expecting the -- it says that the  
13 Board has not completed its risk inquiry. It didn't  
14 say the Board has not completed Phase 2 of the risk  
15 inquiry and there will be a third phase. It just said  
16 that the Board is still considering the consequences  
17 aspect of risk.

18 The idea that this throwing up 30 years of  
19 NRC practice is not the case. The state has put PFS  
20 and Staff on notice that this is how we are going to  
21 pursue our contention, the issue that is still  
22 remaining.

23 PFS and the Staff, let's see, for six  
24 months, nine months, knew what the state's position  
25 was and if they choose just to rest on the assumption

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1 that there will be zero consequences that should not  
2 preclude us from putting on our case, that if there is  
3 a credible accident, then there will be consequences.

4 We're not asking for the Board to consider  
5 incredible events. We're asking the Board to consider  
6 credible events and we take the next step that there  
7 are consequences.

8 Does anyone have anything else?

9 (Pause.)

10 Just a second, Your Honor.

11 JUDGE FARRAR: All right.

12 MS. CHANCELLOR: The only other thing I  
13 would add that again in that joint report of March,  
14 PFS noted that PFS's position is that it's permissible  
15 for the Staff to present its position on a particular  
16 issue for the first time in testimony in the  
17 adjudicatory licensing proceeding, that was when the  
18 state was insisting that PFS amend its license and the  
19 Staff review it before we submit a contention.

20 So I think that it's sort of situational  
21 -- I don't want to say ethics, but the standard shifts  
22 and the state feels like it always comes up with the  
23 short end of the stick. For example, the Commission  
24 changed long-standing NRC practice where all the  
25 residual issues of the state could appeal at the end

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1 of the proceeding. They issued an order recently that  
2 said well, we want you to file this within three  
3 weeks.

4 So I think there is that even if you do  
5 find that this violates long-standing practice, which  
6 I don't think is the case, then I think given the  
7 Commission's desire to get a complete record before it  
8 as soon as possible, once extending the hearing for a  
9 couple of extra weeks.

10 JUDGE FARRAR: Ms. Chancellor, thank you  
11 again very much.

12 Mr. Gaukler, Mr. Turk, Ms. Chancellor, do  
13 you want me and Judge Lam to decide this now or do you  
14 want us to refer it to the Commission?

15 MR. GAUKLER: I was just going to make two  
16 or three points if Your Honor will allow me.

17 JUDGE FARRAR: Answer my question, first.

18 MR. GAUKLER: I think we want you to  
19 decide it now, Your Honor.

20 JUDGE FARRAR: Mr. Turk?

21 MR. TURK: We think it's appropriate to  
22 decide it now, Your Honor.

23 JUDGE FARRAR: Ms. Chancellor?

24 MR. TURK: But I would not oppose, if you  
25 wanted to confer with Judge Abramson, when he's

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1 available, and give us a decision in a day or two.

2 JUDGE FARRAR: Well, the problem with that  
3 is we have you on the phone now and want to get --  
4 well, let me ask you this. How much discovery were  
5 you all planning on doing between now and April 20th?  
6 In other words, is this a dead period or are you able  
7 to use this time?

8 MR. TURK: We're not going to be doing any  
9 discovery between now and April 20th.

10 MR. GAUKLER: We have discovery starting  
11 under both schedules, depositions on May 3rd, based  
12 upon the Staff's issuance, for April 20th to allow  
13 parties 10 days.

14 JUDGE FARRAR: But there was once a  
15 suggestion, Mr. Gaukler that you all might get some  
16 discovery done a head of time.

17 MR. GAUKLER: That did not work out, Your  
18 Honor.

19 JUDGE FARRAR: Okay. Ms. Chancellor, do  
20 we decide it or send it to the Commission?

21 MS. CHANCELLOR: We'd like you to decide  
22 it, Your Honor. (pause) I might add, in our favor.

23 (Laughter.)

24 MR. TURK: Your Honor, this is Sherwin  
25 Turk. The fact that you mentioned that you might want

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1 to send it to the Commission would seem to indicate to  
2 me that you believe it's a significant decision on  
3 your part and if that I would ask you to include Judge  
4 Abramson in your decision so that anything of the  
5 moment would be considered by all three Board Members.

6 JUDGE FARRAR: I didn't necessarily  
7 suggest that I thought it was worthy of going to the  
8 Commission, I just wanted to see what you all thought  
9 about it. The fact that I asked the question doesn't  
10 mean that I'm doing anything other than finding out  
11 your views rather than expressing mine. But thank you  
12 for the thought.

13 Let's take a moment break here. Can  
14 anyone hear me?

15 (Off the record.)

16 JUDGE FARRAR: All right, we're back on  
17 the record.

18 Ms. Chancellor, are you there?

19 MS. CHANCELLOR: Yes, Your Honor.

20 JUDGE FARRAR: Mr. Turk?

21 MR. TURK: Yes, Your Honor.

22 JUDGE FARRAR: Mr. Gaukler?

23 MR. GAUKLER: Yes, I'm here.

24 JUDGE FARRAR: All right, Judge Lam and I  
25 are in agreement that both sides have made cogent and

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1 persuasive cases. Although we had hoped to get a  
2 final schedule established today, the fact that the  
3 Staff report is not coming out until April 20th, the  
4 time in between now and then is essentially dead,  
5 allows us to take up someone's suggestion that we wait  
6 and confer with Judge Abramson because this is a key  
7 matter that we want to make sure we get right and  
8 think about. It does determine the course of the  
9 proceeding. So we will take that option. I think  
10 he's traveling all this week, but what we'll do by the  
11 time he gets back, we will have a transcript. He can  
12 look at it and we will confer and convene, let's set  
13 now a conference call for next Wednesday, the 7th of  
14 April. Hold on a second.

15 (Pause.)

16 Let me retract that. Let's do it on  
17 Thursday, the 8th at 1:30. And let me ask you, we  
18 will tell you our decision at that point and we'll  
19 move forward. Let me ask you to be ready at that time  
20 to tell us how you propose we categorize the major  
21 issues. There are two, three or four of them that we  
22 might divide the trial into, who are the witnesses on  
23 each issue and be ready to talk seriously about a plan  
24 for allocating to each party either by major issue or  
25 over the entire proceeding how much cross examination

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1 time each party will be able to use in its discretion.  
2 It could be divided equally among all witnesses anyway  
3 they saw fit and how you would balance the time  
4 between the fact that one side will have one party on  
5 that side and the other side will have two parties on  
6 that side and how you equalize that.

7 In discussing this with Judge Abramson,  
8 oh, let me say one other thing, as we do the schedule  
9 at that time, the Board Members have serious conflicts  
10 the last week of August and the first of September, so  
11 we were hoping, for example, we were going to suggest  
12 a four-week hearing time between July 26th and August  
13 20th, depending on how this issue had gone or I  
14 suppose you could bifurcate the hearing and have four  
15 weeks of hearing before a two-week break and two weeks  
16 after, but I just wanted you to be aware, as you are  
17 doing your thinking amongst yourselves of the Board's  
18 various conflicts the last week of August and the  
19 first week of September.

20 No matter how our decision comes out after  
21 consulting with Judge Abramson, we want to express our  
22 concern over the appearance that was mentioned that  
23 when the state is not ready to proceed or didn't meet  
24 some time requirement during the course of this  
25 proceeding, the proceeding went on and they suffered

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1 the consequences.

2 It may well be that all we have here is an  
3 appearance and there may be ample justification of why  
4 the Staff and the Applicant believe they had the right  
5 to elect not to meet the state's arguments on  
6 consequences, but there is at least -- we want to make  
7 sure that there's only at most the appearance and not  
8 the actuality of disparate treatment when one side is  
9 not ready to go, they suffer the consequences. When  
10 the other side is not ready to go, they say well,  
11 we'll need more time and those of you who know how the  
12 Board proceeds know that that is not something we want  
13 to ever be associated with. We're troubled by the  
14 appearance and we will wrestle ourselves with the  
15 question of whether that's just an appearance that is  
16 not borne out by the facts or whether that would be a  
17 reality. And by the time we have a decision for you,  
18 we will address that.

19 So there will be no decision today other  
20 than that we will meet with Judge Abramson and have a  
21 decision for you on Thursday, April 8th in a 1:30  
22 conference call. We will send you the information to  
23 participate in that call.

24 Any comments, Mr. Gaukler?

25 MR. GAUKLER: No comments, Your Honor, I'm

1       sorry. I had the mute button on. I didn't realize  
2       that.

3               JUDGE FARRAR: That's all right. I was  
4       afraid that we had lost you.

5               Mr. Turk?

6               MR. TURK: No, Your Honor.

7               JUDGE FARRAR: Ms. Chancellor?

8               MS. CHANCELLOR: Not on what you said,  
9       Your Honor, but I do have one potential issue that I  
10      wish to raise again.

11              JUDGE FARRAR: Go ahead.

12              MS. CHANCELLOR: Shall I do it now?

13              JUDGE FARRAR: Yes, go ahead, Ms.  
14      Chancellor.

15              MS. CHANCELLOR: Referring to a January 2  
16      letter to the Director of the Office of Nuclear  
17      Security and Incident Response asking them for a  
18      portion marked copy of the Utah Expert Reports and  
19      asking them to lift the safeguards designation from at  
20      least the Thorne and Thompson reports, we have not  
21      heard a word from Mr. Zimmerman or anybody else at the  
22      NRC on this issue and I know the Board has been  
23      diligent in instructing the Staff to look into this  
24      issue, but we are just getting no due process at all.  
25      I mean there's no avenue that we can appeal this

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1 further. I guess we can go likely to the Commission  
2 and just plead our case there, but it's very  
3 frustrating, Your Honor, especially when we're going  
4 to be back in D.C. and trying to deal with safeguards  
5 documents in a hotel and it's just going to be very  
6 unmanageable.

7 JUDGE FARRAR: Ms. Chancellor, I never  
8 have any dealings with the Commission, but from what  
9 I know of them I'm sure they would not want to be  
10 bothered with you having to go up there and annoy them  
11 about this.

12 Mr. Turk, what are you going to do about  
13 this?

14 MR. TURK: Your Honor, several weeks ago  
15 I saw a draft of a letter prepared by Mr. Zimmerman to  
16 go back to Ms. Chancellor. It had in it the outcome  
17 that I thought was likely and almost inevitable. I  
18 don't know what happened. I don't know if the letter  
19 was sent out and she hasn't received or if it's been  
20 held up for some reason.

21 JUDGE FARRAR: I think you said at the  
22 beginning that Mr. Zimmerman was there with you.  
23 Whether or not he's still there, could you ask him to  
24 make it a top priority. This is unfair that one party  
25 -- I know the Staff gets to rule on safeguards. We've

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1 recognized their authority and the lack of our  
2 authority, but we're in the midst of litigation and  
3 it's not fair for one party to be holding up another  
4 party's ability to do its business.

5 If the material has to be safeguarded, so  
6 be it, but these people are entitled to an answer and  
7 can your people sitting in the room with you, this is  
8 Tuesday, can they assure me that by Thursday an answer  
9 will be on its way?

10 MR. TURK: I can assure you personally,  
11 Your Honor, that immediately after this conference  
12 call ends I will talk to Mr. Zimmerman or whoever is  
13 in his office and we'll find out what happened to the  
14 letter and I will respond to the state with that  
15 information.

16 JUDGE FARRAR: All right.

17 MR. TURK: Let me clarify something, if I  
18 can?

19 JUDGE FARRAR: Yes.

20 MR. TURK: Mr. Zimmerman was not in this  
21 room today. The people in the room was Ms. Zaccari,  
22 Mr. Waters, Mr. Guttman and Mr. Shewmaker.

23 JUDGE FARRAR: I'm sorry. I thought you  
24 had said Mr. Zimmerman.

25 MR. TURK: No.

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1 JUDGE FARRAR: And let's do this --

2 MR. TURK: May I also address the other  
3 point, Your Honor? The state has not been held up.  
4 I had given the state a response by telephone in which  
5 I told her we do not do portion markings of people's  
6 reports so she knows that answer.

7 If all she's waiting for is a formal  
8 letter back, she already had the informal and when the  
9 letter comes back to her, she'll see it in writing,  
10 but she has not been held up. She knew the answer for  
11 several months already.

12 JUDGE FARRAR: Let me ask you this, Mr.  
13 Turk, when you say "we don't do portion markings" that  
14 may be a rule the Staff generally follows. Is that an  
15 appropriate rule to follow in litigation?

16 MR. TURK: I see no reason to set that  
17 practice aside. The only issue that the state is  
18 raising is the difficulty of being able to communicate  
19 with their witnesses. I think if they would speak to  
20 us about guidance on the kinds of things that need to  
21 be or do not need to be treated as SGI, we would talk  
22 to them about that. But they've ask for a document to  
23 be portion marked and I've told her that the Staff  
24 does not do that.

25 JUDGE FARRAR: When I asked some months

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1 ago to see how we were going to run this hearing, I  
2 asked for the principles the Staff was following in  
3 calling something safeguards or not. I gave it up as  
4 a bad effort because I didn't get any answer. And  
5 that's no criticism of the gentleman whose name  
6 escapes me whose work I've come to respect or whose  
7 approach I've come to expect, but he was unable to  
8 give me an answer that here's the guidelines we follow  
9 and so we said okay, great, the whole hearing is  
10 safeguards.

11 MR. TURK: What I believe I said to Ms.  
12 Chancellor in the past is that the methodologies and  
13 the results of vulnerability studies are not to be  
14 disclosed, that they are treated as safeguards  
15 information. That's the guidance that I've given her.  
16 I don't know what more I need to do in that respect.  
17 I've spoken with her informally and she keeps raising  
18 the issue before you, which I believe is unfair.

19 JUDGE FARRAR: How about this? Why don't  
20 we get her, as I suggested, get her a letter that  
21 states the Staff position. Then she'll either like it  
22 or not like it, but at least she'll have something in  
23 front of her that's not conversation and that she can  
24 -- it will be a clear message that she may like or not  
25 like, but then she'll be able to know where she

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1 stands.

2 MR. TURK: I will speak to Mr. Zimmerman's  
3 office as soon as we break from the conference call,  
4 Your Honor.

5 MS. CHANCELLOR: Just a point of  
6 clarification, Your Honor. I don't recall Mr. Turk  
7 mentioning that they don't portion mark these reports.  
8 I was going on the assumption based on Mr. Stapleton's  
9 conversation with us in a conference call quite some  
10 time ago that Mr. Stapleton said that they do portion  
11 mark all documents and that was the basis on which I  
12 asked for a portion marked copy.

13 It's not just communicating with our  
14 experts. My understanding from talking to Mr. Gaukler  
15 is that it's very difficult to acquire a safe for  
16 safeguarding documents in hotel rooms and if we have  
17 a number of lawyers and a number of experts, and we're  
18 all going to put our documents in a safe for  
19 safeguarding documents, I just don't know if that's  
20 going to be manageable.

21 I do agree that Mr. Turk has been willing  
22 to work with us in terms of how we go about preparing  
23 for the hearing and how we safeguard documents, but I  
24 just don't recall having any conversations with Mr.  
25 Turk prior to -- other than conversations I had prior

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1 to sending the January 2 letter. I just wanted to  
2 make that clear.

3 JUDGE FARRAR: All right, if you all were  
4 able to resolve Contention TT in the very elegant and  
5 useful and appropriate way that you were able to, you  
6 ought to be able to resolve this and Mr. Turk since  
7 the Staff has the lead role in safeguards, we will  
8 count on you to do that. And you've said a couple of  
9 times you will speak to Mr. Zimmerman. Please inform  
10 the Board by Thursday if Mr. Zimmerman chooses not to  
11 respond to your request. We want to know that.

12 MR. TURK: I will get back to the Board  
13 and Ms. Chancellor.

14 JUDGE FARRAR: Thank you. Anything else  
15 that we need to deal with? I'm sorry we entered this  
16 conference fairly excitedly thinking we were going to  
17 set a hearing date, but I think we will be better off  
18 to involve Judge Abramson and there will be no delay  
19 occasioned by waiting because we're awaiting the Staff  
20 report on April 20th.

21 Mr. Turk, we've kind of taken that as a  
22 given. Do I take it from the absence of any comment  
23 that, in fact, the Staff report is still targeted for  
24 April 20th?

25 MR. TURK: Yes, we're still on target.

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1 JUDGE FARRAR: All right. Is anything  
2 going to come out -- there was a possibility that  
3 something would come out earlier?

4 MR. TURK: We were hoping to get out the  
5 aircraft angles and speeds portion before then. I  
6 don't have a date for that, but I will continue to  
7 work with Dr. Kampe and Dr. Goshe to see if we can get  
8 that out sooner. It won't be significantly sooner  
9 than the April 20th date, but if we can get that out  
10 ahead of time, we will.

11 JUDGE FARRAR: All right.

12 MS. CHANCELLOR: Your Honor, I just have  
13 one question. Did you want us to try to come up with  
14 categorizing these major issues and sending you  
15 anything?

16 JUDGE FARRAR: No, just be ready -- yes,  
17 talk to each other and just be ready to let us know  
18 orally in that conversation, but you know the thing  
19 I'm talking about like on seismic, you had like six.  
20 You had soils and you had this and that. Just that  
21 same thing, so that would give us a way to organize  
22 the hearing, organize how we're going to approach our  
23 opinion and organize how we would decide how much  
24 cross examination in toto might be appropriate for a  
25 particular issue as opposed to a particular -- as

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1       opposed to the overall hearing. It just let's us  
2       subdivide some of our management ideas. And we have  
3       talked among ourselves, I want to repeat this. We are  
4       close to coming to the conclusion that the best way to  
5       manage cross examination is to let you do the micro  
6       managing of it rather than us tell you when cross  
7       examination is being inefficient, you are the ones who  
8       understand your cases the best.

9                You are the ones who can say which  
10       witnesses you really need to spend a lot of time with  
11       and which you don't and so it seems that we can macro  
12       manage it and let you micro manage it and that would  
13       be the most suitable way to make sure the cross  
14       examination is under control and that whatever length  
15       of time we set for the hearing, we always know that  
16       we're on target to meet it.

17               So if you all can begin to talk about  
18       that, we can -- we may not have to finalize that  
19       aspect next Thursday's call, but we can have a good  
20       discussion of it.

21               Any other thoughts we need to consider?

22               MR. GAUKLER: We just had one question,  
23       Judge Farrar.

24               JUDGE FARRAR: Yes, Mr. Gaukler.

25               MR. GAUKLER: Are you going to announce

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1 your decision on the issues to be included in the  
2 hearing next Thursday or is that something you're  
3 going to do beforehand?

4 JUDGE FARRAR: It will be next Thursday  
5 because I'm not sure with the travel schedules we can  
6 get together significantly before then. And we have  
7 to wait for Judge Abramson to have a chance to read  
8 the transcript and if we can do it before then, we  
9 will, but we pick that date because of the different  
10 things we're all doing and I think that's the first  
11 time we'll be sure we are all together.

12 MR. GAUKLER: Okay.

13 JUDGE FARRAR: Any other questions?

14 MS. CHANCELLOR: Sorry to be a nuisance,  
15 Your Honor, the dates on which the Board has a  
16 conflict is August 23 through September 3, is that  
17 right?

18 JUDGE FARRAR: Right. August, no August  
19 23 -- yes, August 23 through September 3 and Labor Day  
20 is the 6th.

21 MS. CHANCELLOR: Okay, got it. Thank you.

22 JUDGE FARRAR: The conflicts are not for  
23 the whole two weeks, but there are things in there  
24 that we couldn't go full weeks, so if we had to break  
25 that might be -- if, in fact, we let these other

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1 issues in and we're able to move forward on the  
2 hearing or longer than four weeks or had to be  
3 deferred, maybe you do two weeks before then and two  
4 weeks after, but let's not worry too much about that  
5 until we come up with our decision on these issues the  
6 state wants to present.

7 All right? Again, it is certainly a  
8 delight to preside over a proceeding like this with  
9 lawyers who are so good in not only presenting their  
10 arguments, but responding to the Board's questions and  
11 responding to the other side's arguments and today  
12 you've all three been very eloquent and very powerful  
13 in representing your particular clients' positions and  
14 for that we thank you.

15 If there's nothing else, we will recess at  
16 this point. I'll talk to you in a few days.

17 Thank you.

18 (Whereupon, at 3:21 p.m. the  
19 teleconference was concluded.)  
20  
21  
22  
23  
24  
25

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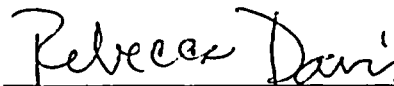
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