

RAS 8230 **Official Transcript of Proceedings**

**NUCLEAR REGULATORY COMMISSION**

DOCKETED  
USNRC

August 5, 2004 (3:54PM)

Title: Private Fuel Storage

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Docket Number: 72-22-ISFSI

Location: (telephone conference)

Date: Tuesday, August 3, 2004

Work Order No.: NRC-1620

Pages 15199-15262

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SECY-02

1 UNITED STATES OF AMERICA  
2 NUCLEAR REGULATORY COMMISSION

3 \* \* \* \* \*

4 ATOMIC SAFETY AND LICENSING BOARD PANEL

5 PRE-HEARING CONFERENCE CALL

6 \* \* \* \* \*

7  
8 IN THE MATTER OF:

9 PRIVATE FUEL STORAGE, L.L.C

Docket No.

10 72-22-ISFSI

11  
12 Tuesday, August 3, 2004

13 Teleconference

14  
15 The above-entitled matter came on for  
16 hearing, pursuant to notice, at 3:00 p.m.

17  
18 BEFORE:

19 MICHAEL C. FARRAR Chairman

20 PETER S. LAM Administrative Judge

21 PAUL B. ABRAMSON Administrative Judge

22  
23  
24  
25  
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1     APPEARANCES (Continued):

2             On Behalf of the Nuclear Regulatory Commission:

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10  
11     OTHER BOARD PERSONNEL PRESENT:

12             SHARON MARKS-PERINI

13             AMY ROMA

14  
15     OTHER NRC SECURITY STAFF PRESENT:

16             JOHN HULL

17             BURNS STAPLETON

18             DARANI REDDICK

19  
20  
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22  
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P R O C E E D I N G S

(3:00 p.m.)

ADMIN. JUDGE FARRAR: Good morning,  
everyone.

We are here for the umpteenth time and  
last time, headed toward the beginning of our hearing  
next Monday.

I want to compliment all of the lawyers  
for meeting the timetables we had on the direct and  
rebuttal testimony and the key determinations.

This is Mike Farrar at headquarters. I  
have with me Judge Lam and Judge Abramson, as well as  
Sharon Marks-Perini from our administrative side and  
Amy Roma, our law clerk.

The reporter is not with us today. So  
people pay attention. She is not seeing who we are  
talking. Please make sure you identify yourselves  
when you speak.

Ms. Chancellor, who do you have there?

MS. CHANCELLOR: Myself and Connie  
Nakahara, Your Honor.

ADMIN. JUDGE FARRAR: And I'm sorry.  
That's for the State of Utah.

For the Applicant?

MR. GAUKLER: Paul Gaukler, Sean Barnett,

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1 and Matias Traviesto Diaz (phonetic).

2 ADMIN. JUDGE FARRAR: Oh, Mr. Traviesto-  
3 Diaz. You couldn't find that buck. Stay away.

4 MR. DIAZ: I saw it.

5 (Laughter.)

6 ADMIN. JUDGE FARRAR: Wherever they are.

7 MR. DIAZ: Yes. This goes off the record.

8 ADMIN. JUDGE FARRAR: And for the staff.

9 MR. TURK: Sherwin Turk, Laura Zaccari,  
10 and we have two newcomers who we are going to be  
11 introducing to you today, and we'll be filing personal  
12 appearances for them. We have John Hull and Darani,  
13 D-a-r-a-n-i, Reddick, R-e-d-d-i-c-k, who are going to  
14 be joining us for portions of the case.

15 ADMIN. JUDGE FARRAR: All right. Well, we  
16 welcome them to the proceeding and we look forward to  
17 getting their notice of appearance.

18 We have a number of items to take up  
19 today, many more than we would have thought. I kind  
20 of got some notes here, and I was lumping three  
21 categories: physical security, procedural and  
22 substance. And let's take them up in that order and  
23 we will defer the pending motion to strike testimony  
24 to the end so that it does not consume too much time.

25 First thing. Sunday move-in. Sharon and

1 I had a meeting last week with the security people and  
2 we had that all arranged. Whether that has changed we  
3 will find out in the next couple of days.

4 Sharon, is that --

5 MS. PERINI: As far as I know, everything  
6 is still they can come in on Sunday, and you'll have  
7 a loading dock available to bring the boxes in.

8 ADMIN. JUDGE FARRAR: All right. I was  
9 concerned that we will have a run-through with them on  
10 Friday to make sure that the new code that we're  
11 operating under here, make sure that you can get in.

12 What time Amy and Sharon will be here for  
13 the benefit of the -- and the applicant? What time  
14 and if you who'd been reasonably coordinated time,  
15 answer what time you all want him.

16 MS. CHANCELLOR: I'm just guessing. Maybe  
17 ten o'clock in the morning.

18 MR. GAUKLER: Applicant here. I guess I  
19 was thinking maybe around noon.

20 ADMIN. JUDGE FARRAR: Okay. Why don't we  
21 compromise at 11? Part of the problem is they won't  
22 let you drive your cars into the building. So you  
23 have to unload the boxes onto trucks at white docks  
24 and then Sharon and Amy will have to escort you back  
25 and forth.

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1 Well, Mr. Turk, what time were you  
2 planing?

3 MR. TURK: We really hadn't planned any  
4 particular time, other than coming over Monday, but  
5 now that you mention it, it would probably be a good  
6 idea for us to claim our locker space some time on  
7 Monday. Whatever you set up will work out.

8 MS. CHANCELLOR: Your Honor, I'm not sure  
9 we'll need the loading dock. I think we're just  
10 FedExing boxes care of Mac Caption (phonetic), to NRC  
11 and we had anticipated that they would arrive FedEx or  
12 UPS on Friday, and that we would have those boxes in  
13 our space, and we would spend our time organizing  
14 whatever it is we ship to you.

15 ADMIN. JUDGE FARRAR: Oh, in other words,  
16 Mac would get the boxes here in the conference room  
17 and you would just then open them?

18 MS. CHANCELLOR: Exactly.

19 MR. STAPLETON: Your Honor, this is Burns  
20 Stapleton that came onto the conference call.

21 ADMIN. JUDGE FARRAR: Thanks, Mr.  
22 Stapleton. We'll get to you in just a second.

23 Mr. Turk, it would help, I mean, at the  
24 same time with the cards being involved and the  
25 building the way it is, no one is supposed to be

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1 unescorted. Sharon and Amy can only watch so many  
2 people.

3 MR. TURK: That's my intention, Your  
4 Honor. Whatever you set up we'll go along with.

5 ADMIN. JUDGE FARRAR: All right. Well,  
6 why don't we shoot for everybody to get here around  
7 11. We'll have Amy and Sharon -- I mean, it's not  
8 like time, but that way --

9 MS. CHANCELLOR: Is there an after hours  
10 number that we can call if we have any problems  
11 contacting on Sunday?

12 ADMIN. JUDGE FARRAR: Sharon's cell phone  
13 is (301) --

14 MS. PERINI: 717-7132.

15 ADMIN. JUDGE FARRAR: That's (301) 717?

16 MS. PERINI: 7132.

17 ADMIN. JUDGE FARRAR: And we will have Tom  
18 -- the front entrance will be closed. You'll have to  
19 come down a little side street and go to the guard  
20 desk.

21 MS. CHANCELLOR: Like you go into vehicle  
22 access?

23 MS. PERINI: As of last Friday, yes. I  
24 haven't heard that anything has changed. So we will  
25 have your names with the guards on Sunday.

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1 MS. CHANCELLOR: Okay. At that guard  
2 station at the rear. All right.

3 ADMIN. JUDGE FARRAR: And you will not be  
4 allowed to drive your car into the building, but you  
5 know, you can use that visitor parking in the back.

6 Then at the hearing, you all have fax  
7 Sharon -- with that this week to make sure the guards  
8 have you, and, Sharon, will they have to check in  
9 first?

10 MS. PERINI: Yes. You will still have to  
11 check in, and you'll have the same badges for you to  
12 use. Each part of it will be the same as a metal  
13 detector, and check --

14 ADMIN. JUDGE FARRAR: Okay. They don't  
15 have to enter on the computer though.

16 MS. PERINI: We'll have a list where  
17 they'll just check off.

18 ADMIN. JUDGE FARRAR: Right.

19 MR. GAUKLER: So we'll get badges each  
20 day? New badges each day?

21 ADMIN. JUDGE FARRAR: Yeah. We tried; we  
22 pushed very hard for a system where you would be like  
23 a contractor and have your own badge for the two or  
24 three weeks, and we could not get that, but you will  
25 have the badge and they have promised us they will

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1 have -- you know, like we can -- nine o'clock hearing.  
2 You tell us when you want to be here. They'll have a  
3 guard there with the list. They'll process you.

4 You'll have to go through the metal  
5 detector, but you will not have to go in on the --  
6 guard preassigned to you.

7 MR. GAUKLER: Well, we have some clients  
8 who may want to attend, and my thinking was I would  
9 get them to sign a nondisclosure affidavit and send  
10 that to Your Honor.

11 ADMIN. JUDGE FARRAR: These are part of  
12 the --

13 MR. GAUKLER: PFS.

14 ADMIN. JUDGE FARRAR: -- of the  
15 Consortium?

16 MR. GAUKLER: Yes.

17 ADMIN. JUDGE FARRAR: That's fine.  
18 They're not witnesses?

19 MR. GAUKLER: They're not witnesses.  
20 That's correct.

21 ADMIN. JUDGE FARRAR: If we don't have  
22 them on the list, nobody is going in.

23 MR. GAUKLER: -- delay the hearing.  
24 That's correct.

25 ADMIN. JUDGE FARRAR: Amy, what's your

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1 cell phone?

2 MS. ROMA: It's (301) 367 --

3 ADMIN. JUDGE FARRAR: Did you all get  
4 that?

5 MR. GAUKLER: No. Your Honor, you're  
6 cutting out, at least on my phone somewhat.

7 MS. ROMA: It's (301) 367-8552.

8 MR. GAUKLER: 8552?

9 MS. ROMA: Correct.

10 MR. GAUKLER: Okay.

11 ADMIN. JUDGE FARRAR: Mr. Gaukler, Sharon  
12 says she -- have your list.

13 MR. GAUKLER: I'll check with my secretary  
14 on that and get that to you.

15 ADMIN. JUDGE FARRAR: All your witnesses,  
16 and we need any past witnesses who are not badged, you  
17 know, outsiders if they want.

18 MR. GAUKLER: We'll get that to Your  
19 Honor.

20 ADMIN. JUDGE FARRAR: I'd ask if you think  
21 of any questions we'll come back to this at the end of  
22 the conference, if any of this is confusing. I will  
23 look to see you at 11 o'clock Sunday, and the hearing  
24 will start at 9:00 a.m. Monday.

25 I had asked Mr. Stapleton to come on --

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1 attention last -- in my attention last week an article  
2 from a New York paper that referred to the  
3 availability publicly of a study about the impact of  
4 a commercial plane crash into Indian Point and says  
5 that -- available before September 11th, and I thought  
6 we'd want to make sure we had -- so I asked Mr.  
7 Stapleton to look if that study was still available  
8 publicly.

9 MR. TURK: Your Honor, this is Sherwin  
10 Turk.

11 I'm sorry. You're cutting in and out on  
12 our phone quite a bit still.

13 MR. GAUKLER: Same here on our phone, Your  
14 Honor. Paul Gaukler, Applicant.

15 MS. CHANCELLOR: Same on the State's, Your  
16 Honor.

17 ADMIN. JUDGE FARRAR: How is this? Is  
18 this better?

19 MR. TURK: Yes.

20 MR. GAUKLER: I think so, yes.

21 ADMIN. JUDGE FARRAR: I had the phone  
22 farther away, and I'll talk more directly into it.

23 Mr. Turk, did you get all of that?

24 MR. TURK: Yes.

25 ADMIN. JUDGE FARRAR: All right. Mr.

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1 Stapleton, can you tell us about that 1987 study? The  
2 question, of course, being if that's on the Web, why  
3 would we -- you know, if that's publicly available,  
4 for the sake of consistency why would information here  
5 need to be private?

6 MR. STAPLETON: Yes, Your Honor. I  
7 understand the concern, and I believe it was a  
8 legitimate one, based on the review of the newspaper  
9 article. I did take a look at the document, the NRC  
10 document. That is still available over the Web and  
11 would also be available through the NRC library.

12 The level of detail is not to the same  
13 degree in terms of consequences or in terms of  
14 scenarios as what we're talking about in the PFS case.  
15 So I believe that the designation safeguards  
16 information is still appropriate.

17 There is, of course, a certain context to  
18 this study in terms of pre and post 9/11, and I would  
19 ask the Board to understand that conditions have  
20 changed significantly in terms of how the Nuclear  
21 Regulatory Commission views the classification of the  
22 protection of certain information.

23 It is true that this document was made  
24 publicly available at the time. It was considered  
25 part of an accident analysis, and in a post 9/11

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1 environment some accident analyses are now considered  
2 detailed and to the point where they would be  
3 advantageous to a potential adversary.

4 As to why the document would still be  
5 available, the NRC reaches a balance as to what good  
6 or harm could come, and I have talked with other  
7 people in the Office of Nuclear Regulatory or NRR, not  
8 a research office, but Nuclear Regulatory Regulation,  
9 I think it's called, and they still concur that most  
10 of what is in there are general assumptions that  
11 engineering students would be able to make, and that  
12 what we have in the PFS case in terms of our details  
13 goes beyond that.

14 So we would still believe that the SGI  
15 designation in the PFS case is accurate.

16 ADMIN. JUDGE FARRAR: All right. Let me  
17 pursue this a little bit. Number one, of course, the  
18 Commission's policy is to have these hearing open  
19 whenever possible, and we need an excellent reasons to  
20 -- that's why I wanted to pursue this question. Given  
21 our druthers, we would much rather have the thing be  
22 open.

23 I had anticipated, Mr. Stapleton, that you  
24 would tell me that this had been available before  
25 September 11th and that it was one of the documents

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1 pulled off and never put back, which I think was the  
2 fate correctly of any number of documents.

3 Was your decision changed at all by the  
4 fact that in the PFS case we are not getting into  
5 radiological consequences. We're talking about what  
6 might happen to the multipurpose canister, but there's  
7 no mention about what the radiological consequences of  
8 that would be. You had that understanding?

9 MR. TURK: Your Honor, before Mr.  
10 Stapleton answers, may I lodge some sort of a -- I  
11 can't object to your questioning, but I just have to  
12 note that I was not aware that you were going to be  
13 raising this kind of a question with Mr. Stapleton  
14 today. I think if you're asking for argument on  
15 whether the information in this proceeding needs to be  
16 retained as safeguards information, that's an issue  
17 that counsel should be addressing, not an NRC staff  
18 employee.

19 ADMIN. JUDGE FARRAR: Well, Mr. Turk, I  
20 hear what you're saying. We, the Board, have an  
21 obligation to -- hearing open where it can be. I  
22 found this document late last week. I thought the  
23 quickest course would be to get it to Mr. Stapleton  
24 because I thought there might be a simple answer.

25 Now that there's not quite so simple an

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1 answer I anticipated, I'm happy to have counsel  
2 address this, but I thought before counsel addressed  
3 it, we'd get the facts on the table and then counsel  
4 is welcome to weigh in.

5 MR. TURK: Well, I really think it is more  
6 appropriate for counsel to address it, Your Honor, and  
7 I wish I had had prior notice because neither the  
8 Board nor Mr. Stapleton even called me to let me know  
9 that this question was coming up.

10 But there's a very simple answer.  
11 Regardless of what has been made available previously,  
12 the issue before you is whether the information that  
13 will become a part of this proceeding needs to be  
14 retained as safeguards information.

15 ADMIN. JUDGE FARRAR: I understand. Let's  
16 not have a lot of time here. Here's my answer to  
17 that. I understand that the issue before us is  
18 whether this information has to be safeguarded, but if  
19 there's prior inconsistent rulings then that's  
20 something that would make us perhaps elevate the  
21 question somewhat.

22 So my first question was: do we have a  
23 prior inconsistent ruling?

24 And Mr. Stapleton has given us reasons why  
25 in his judgment it is not inconsistent, and that may

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1 be the end of the case, especially on obligation --  
2 pursue this before we close the hearing -- this  
3 important to the citizens of Utah and, in fact, the  
4 citizens of the United States. We make sure we have  
5 a very good reason -- harmonized with other rulings  
6 for why this has to be closed.

7 Now, if you want to address why you think  
8 -- hold on just a second.

9 MR. TURK: May I ask Mr. Stapleton, where  
10 are you located right now?

11 MR. STAPLETON: On the second floor in my  
12 office.

13 MR. TURK: Would you have any objection to  
14 joining staff counsel in 16B2?

15 MR. STAPLETON: No, I don't have any  
16 problem. The reason I joined the call from here is  
17 because I was in another meeting and didn't want to be  
18 late. So you're up on what floor?

19 MR. TURK: 16B2.

20 Your Honor, I hope you don't object if I  
21 ask Mr. Stapleton to join us.

22 ADMIN. JUDGE FARRAR: No, that will be  
23 fine, and while he's moving we will go off the record  
24 here while the Board confers.

25 So we're off the record right now.

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1 (Whereupon, the foregoing matter went off  
2 the record at 3:19 p.m. and went back on  
3 the record at 3:21 p.m.)

4 ADMIN. JUDGE FARRAR: All right. We're  
5 back on the record.

6 Mr. Reporter, are you there?

7 THE REPORTER: Yes, I am.

8 ADMIN. JUDGE FARRAR: All right. Mr.  
9 Turk, is Mr. Stapleton there yet?

10 MR. TURK: Not yet, Your Honor.

11 ADMIN. JUDGE FARRAR: All right.

12 MR. TURK: May I ask, Your Honor, if this  
13 is a question that you feel needs to be addressed by  
14 the parties, it may be that we need to highlight it to  
15 the Commission immediately, if you feel seriously that  
16 the proceeding should not remain a safeguard  
17 information closed hearing.

18 ADMIN. JUDGE FARRAR: I have expressed no  
19 opinion of my own or on behalf of the Board for  
20 whether it should or should not be. I'm just trying  
21 to get the facts on the table so that we're not met  
22 later with an allegation that this hearing was closed  
23 unnecessarily.

24 What we've decided to do is we will  
25 continue with this, given the reasons Mr. Stapleton

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1 has given, we will continue with this as a closed  
2 safeguards hearing, and if the Board wants to have  
3 this explored further at a higher level in the  
4 Commission we will take the steps to do that, but for  
5 now we will continue as a safeguards matter in  
6 accordance with the policy that's been adopted thus  
7 far.

8 And our only purpose in inquiring was to  
9 make sure that rulings that the Commission makes on  
10 safeguards that affect us have some basis in  
11 consistency.

12 That's two words, Mr. Reporter.

13 MR. TURK: For the record, Mr. Stapleton  
14 has arrived.

15 ADMIN. JUDGE FARRAR: All right. If you  
16 will pass that on to him.

17 MR. TURK: I will do that. Thank you,  
18 Your Honor.

19 ADMIN. JUDGE FARRAR: Does any party have  
20 objection to what I just said?

21 MR. GAUKLER: No, Your Honor. Paul  
22 Gaukler for the Applicant.

23 ADMIN. JUDGE FARRAR: Ms. Chancellor?

24 MS. CHANCELLOR: No, Your Honor.

25 ADMIN. JUDGE FARRAR: I didn't hear that,

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1 Ms. Chancellor.

2 MS. CHANCELLOR: No, Your Honor.

3 ADMIN. JUDGE FARRAR: Thank you.

4 One more detail on procedures. The  
5 copiers for the applicant and the state will be  
6 delivered, I think on Friday to your conference room,  
7 and you will be charged, I think, just like last year  
8 a per -- it will be metered -- a per copy charge at  
9 the end, eight and a half cents or maybe it's one  
10 cents. I can't tell if this is .85 cents or eight and  
11 a half cents per copy.

12 PARTICIPANT: I think it's .8.

13 ADMIN. JUDGE FARRAR: But you have to  
14 supply your own paper, and you may remember we have a  
15 Kinko's nearby if you haven't arranged for that.

16 I think that's the same arrangement as  
17 last year; is that correct?

18 MR. GAUKLER: I believe so, Your Honor.

19 MS. CHANCELLOR: Yes, I believe so, Your  
20 Honor.

21 ADMIN. JUDGE FARRAR: Are there any other  
22 procedural matters while we still have Sharon here?

23 MS. CHANCELLOR: We received the stamp,  
24 Your Honor, to put on the exhibits that you mailed to  
25 us. That only has to be placed on the exhibits,

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1 right? You don't want that placed on the testimony.

2 ADMIN. JUDGE FARRAR: Just on the  
3 exhibits, and I think we have said there would be just  
4 two copies of the exhibits. So you can either put it  
5 on the original and then run your copy or stamp both  
6 the original and the copy, and all you have to fill in  
7 is the number and the name of your panel, and we will  
8 take care of all the rest.

9 MS. CHANCELLOR: Okay.

10 ADMIN. JUDGE FARRAR: Then if there are no  
11 other procedural questions, Sharon, thanks for joining  
12 us and thanks for donating with Amy your Sunday  
13 afternoon to help us get started quickly.

14 Turning to procedural matters, let's  
15 follow up on the exhibits. You all will have  
16 premarked them. So I know the usual formulation is to  
17 say that you are handing the copies of the exhibits to  
18 the court reporter to be marked for identification.  
19 Just say you're submitting, you know, two copies of  
20 the exhibit previously marked for identification, and  
21 then just hand them. We don't want to burden the  
22 court reporter with them. Just hand them to Amy.  
23 Don't say you're doing that. Just say, "I'm submitted  
24 them already marked for identification," with the  
25 number.

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1 Have you all been in touch with the court  
2 reporter about the number of copies of the mini script  
3 you will need?

4 MS. CHANCELLOR: Yes, we have, Your Honor,  
5 for the State of Utah.

6 MR. GAUKLER: Yes, we have, Your Honor,  
7 for the Applicant.

8 MR. TURK: We have not, Your Honor. Can  
9 I ask the other parties how many copies they're  
10 ordering?

11 MR. GAUKLER: We're ordering two copies of  
12 the manuscript.

13 MS. CHANCELLOR: I don't recall. Somebody  
14 else did it, Mr. Turk.

15 MR. TURK: Okay. Your Honor, I'm not sure  
16 who we're supposed to contact. Normally we get two  
17 copies of the dailies, but I think two copies of them  
18 mini script would be great.

19 ADMIN. JUDGE FARRAR: All right. Well,  
20 why don't you either have your office do it or talk to  
21 Jim Cavanaugh in our office?

22 MR. TURK: I will call him.

23 ADMIN. JUDGE FARRAR: And make sure we  
24 have your order in.

25 MR. TURK: Thank you.

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1 ADMIN. JUDGE FARRAR: All right. Have the  
2 parties been able to reach any stipulations on the two  
3 issues you were working on, the fuel fires and the --

4 MR. GAUKLER: Cask to transfer (phonetic)  
5 building?

6 ADMIN. JUDGE FARRAR: Yeah, the CTB.  
7 Thank you, Mr. Gaukler.

8 MR. GAUKLER: Yes, we've agreed to reach  
9 an agreement on the jet fuel fire. We haven't  
10 hammered out the language of the stipulation yet, but  
11 it should be no problem.

12 I don't think there will be any  
13 stipulation with respect to the CTB, but we have  
14 agreed -- at least not at this time, anyway -- we  
15 have agreed to certain procedures in terms of how e  
16 would approach the CTB.

17 Right now the state appears to have claims  
18 of methodology which are similar to the methodology  
19 claims it has with respect to the casks, and so there  
20 may be some cross-examination with respect to the cask  
21 witnesses and in certain cases where the cask and cask  
22 to transfer witnesses are the same, but that will be  
23 hammered out as we go along further.

24 ADMIN. JUDGE FARRAR: All right. That's  
25 right, Ms. Chancellor?

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1 MS. CHANCELLOR: Yes, that's correct, Your  
2 Honor. In particularly, we want to wait until after  
3 certain testimony before we reach any resolution on  
4 the CTB.

5 ADMIN. JUDGE FARRAR: All right. Thank  
6 you all for working on that.

7 Cross examination plans. I think what we  
8 did last time was you submitted those, not all in  
9 advance, but 24 hours before a witness was due to take  
10 the stand. Have you all talked about what you want to  
11 do that?

12 MR. GAUKLER: We haven't talked about  
13 that, and it was on my list of things to raise today,  
14 Your Honor, but 24 hours sounds right to me.

15 ADMIN. JUDGE FARRAR: Is that acceptable  
16 to everybody?

17 MS. CHANCELLOR: What do we do about the  
18 first witness, Your Honor, Dr. Solar (phonetic)? I  
19 don't know whether we can E-mail the cross examination  
20 plan to you or not, and Mr. Soper will be traveling on  
21 the Sunday. Could we get it to you first thing Monday  
22 morning?

23 ADMIN. JUDGE FARRAR: Yeah, if he's here  
24 in time, if you would give it to Amy Sunday that's  
25 fine. Otherwise we'll take it first thing Monday

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1 morning.

2 MS. CHANCELLOR: Okay. Thank you.

3  
4 ADMIN. JUDGE FARRAR: Speaking of  
5 witnesses, I know we've talked about this before, but  
6 can we go over it one last time in case there are any  
7 changes? What is the precise order of witnesses?

8 Mr. Gaukler, you're on first.

9 MR. GAUKLER: Yeah, it would be Solar and  
10 McMann subject to the court's ruling on the safe  
11 motion to strike. We then would follow with the  
12 staff's cask witnesses, presenting a cask evaluation  
13 and Sanie report.

14 ADMIN. JUDGE FARRAR: Okay. Now, which  
15 panel is that, Mr. Turk?

16 MR. TURK: Mr. Gaukler is referring to the  
17 Bjorkman, Schumaker and B panel (phonetic). Caylan  
18 and Gwinn on Sadia.

19 ADMIN. JUDGE FARRAR: All right. They  
20 would go second.

21 MR. TURK: Right, and by the way, those  
22 rebuttals that they have prepared, we'll put that on  
23 along with the direct.

24 ADMIN. JUDGE FARRAR: Right, and then  
25 we're going to do that throughout, direct and rebuttal

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1 together.

2 All right. Then who, Mr. Gaukler?

3 MR. GAUKLER: Then we will have the state  
4 structure witnesses, Drs. Hoffman, Sosun and Killich.  
5 The parties have agreed as necessary to structure the  
6 cross examination and redirect, et cetera, such that  
7 Dr. Hoffman would be completed by close of Friday.

8 ADMIN. JUDGE FARRAR: All right, and then  
9 he is unavailable the next week?

10 MS. CHANCELLOR: Yes, Your Honor, and he  
11 may need to be excused during part of the day on  
12 Thursday and Friday, just depending on his health. So  
13 he will be available Thursday, Friday, but we'll just  
14 have to play it by ear as to how long he can go each  
15 day if that's acceptable.

16 ADMIN. JUDGE FARRAR: When will he be  
17 arriving, Ms. Chancellor?

18 MS. CHANCELLOR: He will be arriving on  
19 Wednesday evening and leaving on Saturday morning.

20 ADMIN. JUDGE FARRAR: In his absence, let  
21 me tell you what we have been contemplating, given the  
22 significance of this issue and the back and forth  
23 arguments. I am told on at least one prior occasion  
24 at the end of an issue a board set up a system where  
25 in a sense all of the witnesses were being questioned

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1 at once. When you got down to the final, you know,  
2 re-rebuttal or surrebuttal, I'm told that a Board  
3 allowed counsel to only do rebuttal of his or her own  
4 witnesses, but to have the other witnesses who were  
5 still in the room for the other parties immediate  
6 comment. Rather than have them wait to get on the  
7 stand, it was set up so that they were all in a sense  
8 on the stand at the same time.

9 We don't know for sure that this case will  
10 come to that, but if it did, we wanted to ask you know  
11 about the availability of witnesses. What you're  
12 saying is if we wanted to do that, we would have to do  
13 that thursday or Friday?

14 MS. CHANCELLOR: With respect to Dr.  
15 Hoffman and Drs. Killich and Sosun will be there for  
16 a much longer part of the hearing, for part of the  
17 time when they aren't on the stand as well as, of  
18 course, when they're testifying.

19 ADMIN. JUDGE FARRAR: Is Dr. Hoffman the  
20 leader of this group? I mean, is he the --

21 MS. CHANCELLOR: Well, it's a  
22 collaborative effort, Your Honor, but Dr. Hoffman is  
23 more involved with setting up the model, the geometry  
24 in the model, and probably at this stage a greater  
25 role for Dr. Sosun and Killich.

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1 ADMIN. JUDGE FARRAR: Okay. Let's do  
2 this. Let's proceed and see where we get to on  
3 Thursday, and Ms. Chancellor, please make sure that  
4 Dr. Hoffman knows. I mean, he can just give us the  
5 high sign if he needs to, you, no, leave the hearing  
6 room. He's not going to need our permission, and  
7 we'll be happy if he wants to go somewhere other than  
8 the conference room to make our space available to him  
9 if he needs to rest or whatever.

10 So tell him that while we will be  
11 concerned about his physical welfare, that's not to  
12 say we won't be as tough on him mentally as anybody  
13 else, but in terms of his physical well-being, we'd be  
14 happy to help make sure that he is able to get through  
15 it.

16 MS. CHANCELLOR: Thank you for that  
17 accommodation, Your Honor.

18 ADMIN. JUDGE FARRAR: All right. Then  
19 after, Mr. Gaukler, after the state structural witness  
20 panel, what happens then?

21 MR. GAUKLER: Then comes the staff's  
22 witness panel in the State of Utah reports, Dr.  
23 Bjorkman and Dr. Erummaia, I believe. I don't know if  
24 there's somebody else or not.

25 MR. TURK: Just those tow.

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1 ADMIN. JUDGE FARRAR: All right.

2 MR. GAUKLER: And that would be starting  
3 some time Monday.

4 ADMIN. JUDGE FARRAR: All right, and  
5 that's because they are challenging the state's  
6 testimony rather than presenting their own?

7 MR. GAUKLER: Yes, and also because it  
8 worked out best for the state's witnesses for them to  
9 come before this panel as well. So a combination of  
10 the two, Your Honor.

11 ADMIN. JUDGE FARRAR: All right. Then  
12 what?

13 MR. GAUKLER: Then we have provided for a  
14 time for what you call the final rebuttal by  
15 everybody.

16 ADMIN. JUDGE FARRAR: All right, and so  
17 you're about to tell me that by Wednesday, the second  
18 week we're done with that issue?

19 MR. GAUKLER: That's the goal, yes, Your  
20 Honor.

21 ADMIN. JUDGE FARRAR: And where does this  
22 CTB testimony come in? Does it come in at that point  
23 somewhere?

24 MR. GAUKLER: We've had a lot of  
25 discussion on that. It's not entirely clear where we

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1 would come in. One possibility is it could come in at  
2 the same time the staff testimony gave us testimony on  
3 the State of Utah reports, i.e., the staff's testimony  
4 with respect to the CTBs. The other possibility could  
5 come with the staff's testimony on the CTB could come  
6 in Thursday or Friday.

7 ADMIN. JUDGE FARRAR: Thursday or Friday  
8 of the first week?

9 MR. GAUKLER: Yeah.

10 MS. CHANCELLOR: No, the second week,  
11 Paul.

12 MR. GAUKLER: Second week, yeah, right.

13 ADMIN. JUDGE FARRAR: All right.

14 MR. GAUKLER: Excuse me. I apologize.

15 We have not set a time for Mr. Eberson's  
16 testimony. We're waiting to see further developments,  
17 whether we would need to bring him or not, whether we  
18 could stipulate to the admission of his testimony in  
19 some matter, shape or form..

20 MS. CHANCELLOR: Your Honor, this is  
21 Denise Chancellor.

22 The state's concern is that we get through  
23 structure by Wednesday, the 18th, because our other  
24 two witnesses are unavailable on the Thursday and  
25 Friday, and so we want team to put the NECTB testimony

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1 on as a single panel as part of the structural  
2 testimony if it would interfere with meeting that  
3 deadline of the finishing structure by the 18th.

4 ADMIN. JUDGE FARRAR: Ms. Chancellor, are  
5 you suggesting that on the second Thursday and Friday  
6 we're going to switch to angles and speed, regardless  
7 of whether we' finished with structure because of the  
8 availability of witnesses?

9 MS. CHANCELLOR: I believe that would be  
10 the case, Your Honor.

11 MR. TURK: That's not my understand, Your  
12 Honor. My understanding is that the following week  
13 when we have hearings starting at noon on Tuesday and  
14 going until noon on Thursday that that week is  
15 available for aircraft angles and speeds also.

16 ADMIN. JUDGE FARRAR: Oh, no, right. But  
17 that we have to start angles and speeds on the second  
18 Thursday rather than let structural flop over into  
19 that second Thursday and Friday.

20 MR. TURK: No, that' not my understanding.  
21 My impression based on my previous conversation is  
22 that angle and speed should not take four days of  
23 testimony which is what you would be allowing for it  
24 to take if you thought it was Thursday, Friday and the  
25 following week and two days.

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1 MR. GAUKLER: I have one constraint in  
2 terms of -- Paul Gaukler here for the Applicant. We  
3 have one constraint in that we would start off angles  
4 and speed testimony with the joint testimony of Dr.  
5 Cornell and General Jefferson and Colonel Sly, and Dr.  
6 Cornell is not available the following week. So we  
7 would at least have to get that testimony out of the  
8 way, the Thursday/Friday of the second week.

9 MS. CHANCELLOR: Your Honor, I think to  
10 get what you're driving at that we're almost forced to  
11 finish structure by the 18th because it's very  
12 difficult for us to get our witnesses back. They  
13 start scattering all over the globe, and we would like  
14 to do whatever we can to get structure finished by the  
15 18th, and we think we should be able to do that, given  
16 that we've got one, two, three, four, five panels, and  
17 we've roughed out about how many days it should take  
18 for each panel, and I think we're hopeful that it will  
19 wrap up by the 18th.

20 ADMIN. JUDGE FARRAR: And who is going to  
21 be the enforcer since I don't yet have any time  
22 allocations? Are we going to trust you all to be  
23 short and sweet and get it done or am I going to look  
24 to my new friend, Judge Abramson, to lower the boom on  
25 you or --

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1 MS. CHANCELLOR: Who has the big stick?  
2 Well, one way to do it would be to say, you know, have  
3 some sort of benchmark for when we should be through  
4 with each witness, would be one way to keep tabs on  
5 whether we were on track or not. We haven't been able  
6 to come to any resolution on putting time on the  
7 actual cross examination of a particular witness.  
8 State has come up with time that it needs for  
9 structure, and we've looked at it, as I said, in terms  
10 of breaking it down per witness per day, and that's as  
11 far as we've gotten.

12 MR. TURK: One thing that might be  
13 worthwhile noting, Your Honor, is that -- this is  
14 Sherwin Turk -- Mr. Gaukler and Ms. Chancellor and I  
15 had a conversation today about witness cross  
16 examination time. The state in estimating that it  
17 will be done with the staff and FPS cask structural  
18 witnesses by the end Wednesday of the first week  
19 assumes one day of cross examination for each party  
20 panel and a half day of direct and redirect.

21 So, for instance, that first day that Dr.  
22 Solar in on the stand with all of his pieces of  
23 testimony, the state is estimating one day of cross  
24 examination to be followed by approximately half a day  
25 of redirect by PFS, and then they would move on to the

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1 staff's witnesses on the cask. I personally think  
2 it's very ambitious. I would love it if we can meet  
3 the schedule, but it is very ambitious, I believe.

4 ADMIN. JUDGE ABRAMSON: This is Judge  
5 Abramson.

6 Suppose that as we go through this we are  
7 able to keep things moving along by trying to eliminate  
8 duplicative questions and get people to move along  
9 more rapidly. Are your witnesses here for a time  
10 period that would enable you to compress the schedule?  
11 I have been hearing you all talking about lengthening  
12 the schedule.

13 MR. GAUKLER: Your Honor, Paul Gaukler  
14 here.

15 In terms of our witnesses, Dr. Solar will  
16 be there the entire time. Dr. McMann would be there  
17 for the first couple of days, and he would be able to  
18 come back at relatively short notice, I believe.

19 With respect to the next panel of  
20 witnesses that we would have coming on after  
21 structure, I have told the witnesses to be there such  
22 that they could go on Wednesday morning if we reached  
23 that point in time.

24 MS. CHANCELLOR: Your Honor, I must say  
25 very optimistic there. For the state with respect to

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1 structure, we would have two other witnesses available  
2 on Wednesday, the 11th so they could go on a day  
3 early. With respect to speed and angle and ordinance,  
4 we just have the one panel. They are pilots, and we  
5 had to find a date certain for those two gentlemen, an  
6 so they would not be available earlier than the last  
7 week, the week of the 24th, the last week of the  
8 hearings in August.

9 So we wouldn't be able to move that  
10 back -- forward. Wrong way.

11 ADMIN. JUDGE LAM: I do share Mr. Turk's  
12 concern about optimistic scheduling. My question to  
13 all of the parties is assuming the schedule is not  
14 realistic and the witnesses are not available, what  
15 are the back-up plans that you have? Do you have a  
16 fallback position?

17 MR. GAUKLER: I've given that some  
18 thought, Your Honor, and I guess my fallback position  
19 would be what Judge Abramson suggested at the last  
20 conference call if we find ourselves not making this  
21 time that we think we should. We would consider some  
22 type of maybe going an hour extra a day or maybe doing  
23 a half day on Saturday, the first Saturday.

24 I think maybe in conjunction with this,  
25 while we parties haven't been able to agree to any

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1 time deadlines, maybe we might want to have a system  
2 where we do keep time so that we kind of have a  
3 general idea how much each party is taking. Because  
4 we did have some general percentages that we kind of  
5 roughed out before, although we never agreed upon  
6 them, as to roughly what each party should take, and  
7 some at least within plus or minus five percent.

8 ADMIN. JUDGE FARRAR: All right. Well, we  
9 will put our heads together before then. I guess the  
10 most important caution is I would think this case has  
11 been as prepared as any there will ever be. We have  
12 been working on it sine the company first kind of  
13 fixed up its application after our decision of now 15,  
14 16 months ago.

15 And I can assure you that each of the  
16 Board members is going to be familiar with the  
17 testimony, familiar with the exhibits and so you will  
18 not have to lay a whole lot of predicate for us, and  
19 so again, as I've been encouraging you sine the very  
20 first of these conferences, get up there and ask your  
21 question. We will know the context.

22 Now, as I said, there are some times where  
23 you want to paint a context to trap somebody, but if  
24 you're just asking questions that are penetrating  
25 questions, just ask the question and we will be ready.

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1 We will understand the context. You call attention to  
2 the area of the testimony, attention to Question and  
3 Answer 29, and then ask your question. You don't have  
4 to get them to repeat what they said there.

5 Just get right into the question. We're  
6 not a jury. You don't have to educate us by having  
7 them repeat their testimony. This other education we  
8 will be seeking, but it doesn't have to be by them  
9 repeating the testimony, and I think that will save  
10 some time. So I encourage you all to do that because  
11 let's make the questioning as effective and efficient  
12 as possible.

13 Any other or any follow-up to this topic?

14 MR. TURK: Your Honor, I think there's one  
15 more issue that PFS and the state are talking about  
16 possibly reaching a stipulation on, and that was jet  
17 fuel fire. As I understand where they stand on that,  
18 they are going to be working on something. Hopefully  
19 that issue may be resolved without having to go to  
20 hearing.

21 ADMIN. JUDGE FARRAR: Right. That's what  
22 I think I heard Mr. Gaukler.

23 MR. GAUKLER: Yeah, we expect that issue  
24 to be resolved. Just have to work through the  
25 details. That's all.

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1 ADMIN. JUDGE FARRAR: All right. I want  
2 to thank you all for sending Amy your E-mailed exhibit  
3 list which we'll use as the log. Any other on the two  
4 topics we've talked about, physical security and  
5 procedural? Any other questions before we get into  
6 substantive matters?

7 MR. GAUKLER: Not here, Your Honor. Paul  
8 Gaukler for the applicant.

9 MS. CHANCELLOR: None for the state, Your  
10 Honor.

11 ADMIN. JUDGE FARRAR: All right. Mr.  
12 Turk? Mr. Turk?

13 MR. TURK: I'm sorry. I said we have  
14 nothing, Your Honor.

15 ADMIN. JUDGE FARRAR: All right. We  
16 didn't hear that. Thank you.

17 Let's turn to substantive matters, and the  
18 first one, a number of people have quoted our decision  
19 of March 10th, particularly page 107 where there's a  
20 sentence in the middle of the paragraph that we were  
21 far from certain that pilots can be counted on not to  
22 take improper action, and then there's the phrase "or  
23 to fail to take proper action." And I Don't know how  
24 that got in there. I can't remember the exact process  
25 we followed, but it seems to me that the words "to

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1 fail" in that are surplus and kind of take away from  
2 the meaning of that sentence.

3 If you read that whole section of the  
4 opinion, what we were saying was in response to the  
5 applicant's argument about the R factor and where the  
6 applicant wanted us to count on the pilot's behavior.  
7 We were saying, no, you can't count on their -- for  
8 purposes of nuclear regulation you cannot count on  
9 their behavior to do the right thing or not to take  
10 improper action, and it looks to me like that sentence  
11 got a little more convoluted than it should have been,  
12 and a number of people have cited it, and I want you  
13 all to know that if you read that whole portion of the  
14 opinion, we weren't saying anything different there or  
15 did not intend to say anything different there than  
16 what we said in the rest of that opinion, which is  
17 that we cannot credit the applicant's theory.

18 So please be advised of that, and if that  
19 does not exactly convey what was in our minds, then  
20 the Board Chairman will take the responsibility.

21 Is that clear? Mr. Gaukler?

22 MR. GAUKLER: Yeah, I understand you're  
23 saying to fail is essentially surplus in that last  
24 sentence.

25 ADMIN. JUDGE FARRAR: Yeah. It could have

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1       been and almost makes it -- you know, there's an extra  
2       -- that becomes an extra negative.

3               Ms. Chancellor.

4               MS. CHANCELLOR: Yes, Your Honor.

5               ADMIN. JUDGE FARRAR: Mr. Turk?

6               MR. TURK: Yes, Your Honor, we understand  
7       it the way you wrote it, and we understood it is the  
8       way you're saying it today, the same way.

9               ADMIN. JUDGE FARRAR: Okay. Our last  
10      prehearing order, July 22nd, we had a footnote on page  
11      5 which asks you the question about whether it would  
12      benefit your later probability presentation if we were  
13      to try to give you a preliminary thinking on angles  
14      and speeds some time or after the close of the last  
15      session in August.

16              You know, that's just an idea. If you  
17      don't think it's a good idea or if your witnesses on  
18      probability are equipped to proceed on different  
19      presumptions or assumptions, let us know. Anybody  
20      have a thought? Ms. Chancellor.

21              MS. CHANCELLOR: No, nothing here, Your  
22      Honor.

23              MS. CHANCELLOR: I mean, would it help you  
24      if we tried to do that?

25              MS. CHANCELLOR: I think that depends on

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1 how our witnesses feels about that, and either way,  
2 we'll just go with whatever you decide. I mean, from  
3 your point of view, it may make sense to iron that out  
4 so that we're addressing what is in your mind as that  
5 phase of the hearing.

6 ADMIN. JUDGE FARRAR: All right, and of  
7 course, that was what our thinking was. Why have a  
8 probability witness who's talking about something that  
9 we might by that time know is probably not the way  
10 we're going, although I hate to pin us down too early  
11 at this stage.

12 Mr. Gaukler, what are your thoughts?

13 MR. GAUKLER: I think I agree with you,  
14 Your Honor, that that would probably be a good idea to  
15 find out what the Board is thinking in that respect so  
16 we can stress it.

17 ADMIN. JUDGE FARRAR: Mr. Turk?

18 MR. TURK: I like the idea in concept. We  
19 in our rebuttal testimony from Dr. Camp and Dr. Gauche  
20 put in a piece that says is you deleted certain  
21 accidents, here's what you would get, but we're not  
22 sure which way you're leaning. So we're not sure  
23 exactly which accidents should properly be deleted in  
24 your view.

25 But I don't know that you can rule on that

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1 before you hear the witnesses.

2 ADMIN. JUDGE FARRAR: Right. Well, maybe  
3 the best thing then is let's hear the speeds and  
4 angles witnesses and, you know, if at the end of that  
5 we think it's fairly certain or, you know, we're  
6 inclined to go a certain way, we will try to let you  
7 know that.

8 If, on the other hand, we think that the  
9 matter requires complete analysis in the fullness of  
10 time, we will not give you that ruling. So we will  
11 wait and see how that goes.

12 Let's go off the record here. The Board  
13 wants to consult among itself and we'll be back with  
14 you in a minute.

15 (Whereupon, the foregoing matter went off  
16 the record at 3:54 and went back on the  
17 record at 3:56 p.m.)

18 ADMIN. JUDGE FARRAR: All right. We're  
19 back on the record.

20 Before we get into the argument on the  
21 state's motion to exclude testimony, are there any  
22 other security or procedural or substantive matters we  
23 need to take up?

24 MR. GAUKLER: Nothing here, Your Honor,  
25 for the applicant.

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1 MS. CHANCELLOR: Nothing for the state,  
2 Your Honor.

3 MR. TURK: Nothing for the staff.

4 ADMIN. JUDGE FARRAR: All right. Then  
5 let's go right into the state's motion. Ms.  
6 Chancellor, have you seen Mr. Barnett's reply?

7 MS. CHANCELLOR: Yes, I received it a  
8 couple of hours ago, Your Honor, or an hour ago.

9 ADMIN. JUDGE FARRAR: All right. Why  
10 don't you argue your motion briefly, but taking in to  
11 account, you know, the position that Mr. Barnett has  
12 about, you know, how this matter developed.

13 MS. CHANCELLOR: Yes, Your Honor, and I'll  
14 be oblique so that I won't mention any safeguards  
15 matters.

16 In this cask breach probability phase of  
17 the hearing, one of the issues that has come up  
18 repeatedly is failure strains, and Dr. Sosun, as part  
19 of the 2004 report, refers to failure strains, the  
20 need for testing in these instances, and Answer 19 of  
21 the direct testimony is an elaboration of a conclusion  
22 from that 2004 report.

23 And many of the witnesses have used  
24 references to explain the -- to try and crystallize  
25 how to get the concept of stresses and strains across,

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1 and Dr. Sosun in his Answer 19, in the first part of  
2 that answer, refers to prudent engineering practices,  
3 and he references the ANSI standards as an elaboration  
4 of his opinions why you need to have prudent  
5 engineering to have testing and that you can't rely  
6 totally on calculated strain.

7 I don't think this is a, quote, bolt out  
8 of the blue, as PFS asserts. It is something that Dr.  
9 Solar in part addressed in his direct testimony and  
10 which Dr. Sosun elaborated on his deposition  
11 testimony. There was a considerable amount of  
12 questioning of Dr. Sosun in the three days of  
13 depositions, a lot of references to failure strain and  
14 stainless steel.

15 The state has not had the opportunity to  
16 depose Dr. McMann or otherwise do any investigation  
17 into the allegations that he -- to the testimony that  
18 he presents, and we feel at this late hour that it is  
19 prejudicial for this testimony to come in.

20 ADMIN. JUDGE FARRAR: All right. Mr.  
21 Barnett, do you want to respond to that?

22 MR. BARNETT: Your Honor, Mr. Gaukler will  
23 be responding for the state motion.

24 ADMIN. JUDGE FARRAR: All right.

25 MR. GAUKLER: Yes, Your Honor. First of

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1 all, the testimony is the first time that Dr. Sosun  
2 referred to the DUE standard requiring application of  
3 the ANSI report, and I believe he uses the word  
4 "require" in there, and we were responding to that  
5 assertion as to the various reasons why it's  
6 inappropriate to use that standard to set the standard  
7 in this case here.

8 Moreover, this has been an evolution of  
9 the state's position from last fall where they made no  
10 reference to any requirement of testimony or anything  
11 like that.

12 So we've been responding to scenarios, the  
13 different scenarios of the state as they come forward,  
14 and this is the first time you've seen the ANSI  
15 references and the train (phonetic) of the DUE  
16 standards requires that, and we responded to that,  
17 believing that we had to do it fully.

18 ADMIN. JUDGE FARRAR: Could Dr. Solar have  
19 given that response?

20 MR. GAUKLER: We seriously considered  
21 that, and we didn't make the decision until very close  
22 to filing the testimony to actually use Dr. McMann,  
23 and after talking with Dr. Mann, and I felt that he  
24 had stuff that he could bring to the table that Solar  
25 would not, understanding of the materials that were

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1 useful and relevant based upon his broad experience  
2 and background.

3 ADMIN. JUDGE FARRAR: All right. Let me  
4 ask you this. It seemed to me that in most of our  
5 discussions about how we were going to go through the  
6 prehearing phase, there was an assumption that the  
7 prefiled rebuttal would be by the same witnesses who  
8 had prefiled the direct.

9 Now, it seemed to me nobody anticipated  
10 this situation where you would want to do prefiled  
11 rebuttal by somebody else. The fact that we didn't  
12 anticipate it, didn't contemplate it, does that mean  
13 that you need -- more than the reason you've just  
14 stated to put that in?

15 MR. GAUKLER: Your Honor, I believe that  
16 this is an argument that we were entitled to address  
17 in terms of a state's changing position, and that we  
18 looked at it and believed that this was the proper way  
19 to address it.

20 I don't think there was anything that  
21 precluded us from doing that, and that we were  
22 responding to a change in the state's position.

23 ADMIN. JUDGE FARRAR: Should you have  
24 anticipated in your direct testimony that because  
25 there are two different kinds of steel here that the

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1 question of what standards apply to one and the other  
2 ought to have been fairly encompassed in your direct  
3 testimony?

4 MR. GAUKLER: First of all, we said what  
5 we thought applied in our direct testimony to the ASME  
6 standard. Okay? And we set that forth in detail in  
7 response to the claims that Dr. Sosun did make.

8 And in terms of trying to anticipate, it's  
9 hard to prove a negative or establish the negative,  
10 and we have the right when they have come up with some  
11 new issues to respond to those issues. That's the  
12 right that we have as a party.

13 ADMIN. JUDGE FARRAR: All right. What  
14 rights should Ms. Chancellor now have? You have now  
15 brought in a new witness. Assuming without deciding  
16 that we agreed with you that, for whatever reason or  
17 combination of reasons, this is a response you were  
18 entitled to make. The fact is this is a new witness  
19 who was not deposed, who is new on the scene. We're  
20 now probably one day before the state is starting to  
21 box up its documents and start traveling.

22 What right have you created in them in  
23 order that could present an effective response?

24 MR. GAUKLER: Two things, Your Honor.  
25 First of all, they brought the issue forward that we

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1 felt we needed to respond to. They created the  
2 situation, number one.

3 Number two, there are many issues that  
4 have been raised by the state's witnesses that we will  
5 not have had a chance to depose them on. There are  
6 many new simulations that they brought, and we have  
7 not taken issue with that.

8 So we believe that if the statements  
9 should have been raised by Dr. Solar, that they could  
10 now have had a chance to depose Dr. Solar again on  
11 those issues.

12 Notwithstanding that, we would make Dr.  
13 McMann available for deposition if this Board deemed  
14 that was appropriate. We certainly would, and we  
15 object to his available.

16 ADMIN. JUDGE LAM: This is Judge Lam.

17 Mr. Gaukler, did you say you would make  
18 Dr. McMann available for deposition?

19 MR. GAUKLER: Yes.

20 MR. TURK: Your Honor, this is Sherwin  
21 Turk. At some point I'd like to make a comment about  
22 the issue, although it's not a witness that we have,  
23 but the issue before you is something that we're  
24 involved with.

25 ADMIN. JUDGE FARRAR: All right. Go

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1 ahead, Mr. Turk.

2 MR. TURK: We did not anticipate the  
3 state's testimony of July 12th would be getting into  
4 issues concerning the steel properties. Our rebuttal  
5 testimony, like the applicant's rebuttal testimony,  
6 addresses matters for the first time that the state  
7 raised in their direct testimony of July 12.

8 We unfortunately from our vantage point  
9 have a witness on our main panel who is very capable  
10 of addressing the ASME code and the EPRI document that  
11 the state cites, but we weren't expecting that we  
12 would have to do this because the issue had never been  
13 raised in either of the state's previous reports of  
14 September '03 or May '04, nor was it ever addressed in  
15 the depositions.

16 We spent three or four days deposing Drs.  
17 Hoffman, Sosun and Killich. The issue never came up.  
18 So when we filed our direct testimony on July 12, we  
19 didn't have any reason to refer to the issue.

20 Because the state raised it at the last  
21 minute in their direct testimony, it suddenly became  
22 an issue that had to be addressed in rebuttal. So the  
23 question is is an existing witness able to take that  
24 on or does a party have to go and find a new witness  
25 who can address the new issue.

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1 In our case we were lucky. We had very  
2 capable witnesses that can address the issue without  
3 having to reach for a new person. I can't speak to  
4 PFS' means.

5 ADMIN. JUDGE FARRAR: Thank you, Mr. Turk.  
6 Ms. Chancellor, would you respond to this,  
7 please?

8 MS. CHANCELLOR: Yes, Your Honor. The  
9 issue of failure strain and steel has been  
10 longstanding in this case, and because the state  
11 references a different document than it may have  
12 referenced in its other also prefiled testimony or PFS  
13 didn't ask the witnesses about the ANSI standard in  
14 the depositions is no reason, we believe, to bring in  
15 a new witness, and it certainly is not a seachange  
16 from the state's position.

17 If you look at the key determinations and  
18 in the reference to the prefiled testimony up front,  
19 and center is what are the phase strains. That is  
20 something that we have argued about, and each party  
21 has different positions on.

22 So I think that it's different bringing in  
23 a new witness as opposed to saying, "Well, the state  
24 presented different issues that weren't presented  
25 before, as did PFS, through the same witnesses."

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1 Well, we have this brand new witness.  
2 We're going to have to take time on the stand if this  
3 testimony is allowed in, in essence, to conduct a  
4 deposition on the stand or do what we did in the  
5 seismic hearing and squeeze in a deposition in the  
6 middle of hearing, and in either case it's this last  
7 minute effort that we feel undermines our ability to  
8 proceed fairly.

9 MR. GAUKLER: Your Honor, the substance of  
10 the state's position has changed. We're entitled to  
11 address that. You would be entitled to address that,  
12 bring a new witnesses on in light of rebuttal, if that  
13 were the case, if the cert. factors were correct.

14 In terms of the state's -- about  
15 depositions, the deposition of Dr. McMann on a three  
16 or four-page assessment would be entirely different  
17 than a deposition of Dr. Luke on an extended, lengthy  
18 report.

19 ADMIN. JUDGE FARRAR: Mr. Gaukler, is Mr.  
20 Turk right, that the staff lucked out? In other words  
21 he's saying the state put something in their direct  
22 testimony and he was entitled to response, and he  
23 happened to be able to do it through that same  
24 witness.

25 Is he correct in that? The issue should

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1 not turn on whether your existing stable of witnesses  
2 can cover it?

3 MR. GAUKLER: Absolutely, Your Honor.  
4 That's correct. If the state is entitled to put  
5 testimony on like it did, we should be entitled to  
6 respond to it.

7 ADMIN. JUDGE ABRAMSON: This is Judge  
8 Abramson. I'd like to ask Ms. Chancellor a question.

9 Ms. Chancellor, do I understand correctly  
10 that it's your view that the issue of failure strain  
11 has been on the table for a long time?

12 MS. CHANCELLOR: Yes, that's my  
13 understanding, Your Honor.

14 ADMIN. JUDGE ABRAMSON: And if that's the  
15 case, are your own witnesses prepared to discuss the  
16 matter of failure strain?

17 MS. CHANCELLOR: Yes, I believe, yes.

18 ADMIN. JUDGE ABRAMSON: And then if the  
19 applicant were to put on a witness who he believes has  
20 expertise in failure strain, would your witnesses be  
21 in a position to advise you on what aspects of his  
22 testimony should be challenged?

23 MS. CHANCELLOR: Well, it depends on how  
24 you define -- how the applicant presents failure  
25 strain. The molecular structure of steel may not

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1 necessarily in the state's witnesses' point of view go  
2 to failure strain. So I don't know whether our  
3 witness will be able to address certain aspects of  
4 what PFS may consider to be relevant to failures  
5 strength.

6 ADMIN. JUDGE ABRAMSON: As I understand  
7 your prefiled testimony and rebuttal testimony, the  
8 focus is not on molecular structure, but the focus is  
9 on whether particular standards developed by ANSI and  
10 ASME should apply. Is that accurate?

11 MS. CHANCELLOR: That is accurate, but Dr.  
12 McMann, the focus of his testimony is on the molecular  
13 structure of stainless steel versus carbon steel.

14 ADMIN. JUDGE ABRAMSON: I understand that  
15 that seems to be the focus of his rebuttal testimony,  
16 but if the question is whether a particular standard  
17 is developed by the American nuclear group or the ASME  
18 should apply, should not your experts who are  
19 proposing that those standards should apply understand  
20 the basis for application of those standards?

21 MS. CHANCELLOR: Yes, Your Honor.

22 ADMIN. JUDGE ABRAMSON: Okay. I think  
23 that's all I need to hear.

24 ADMIN. JUDGE FARRAR: Ms. Chancellor,  
25 assuming, again, without ruling that we were to deny

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1 your motion to strike, what procedural rights did you  
2 say you needed to have to protect your interests?

3 I think you had mentioned having a lengthy  
4 cross examination, which in effect you'd be doing the  
5 same as a deposition rather than perhaps more  
6 targeted, or doing a separate deposition before you  
7 cross examine, which of those would you prefer? And  
8 how --

9 MS. CHANCELLOR: Which of those worse  
10 options would we like?

11 ADMIN. JUDGE FARRAR: Yes.

12 MS. CHANCELLOR: I'd really like Mr. Soper  
13 to make the call. I mean, we certainly don't want to  
14 take the focus away from the hearing of what we  
15 consider to be the central issues on the hearing to go  
16 off on a tangent on the witness' qualification and his  
17 background.

18 But what I'm struggling with is that the  
19 state's lawyer comes in on Sunday night. We start the  
20 hearing on Monday morning. There's no possibility for  
21 a deposition or even an informal one.

22 ADMIN. JUDGE FARRAR: Suppose you took one  
23 crack at cross examining him and then he came back  
24 later and you extended it or, you know, you had  
25 another chance after state counsel had had a getter

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1 opportunity to familiarize yourself?

2 MS. CHANCELLOR: Maybe if we went forward  
3 with the cross examination focusing on the central  
4 issues and then to the extent that we felt like we  
5 needed additional information to maybe impeach Dr.  
6 McMann, for example, we could have a deposition or  
7 bring him back for additional cross examination.

8 MR. GAUKLER: Another option, Your Honor,  
9 is this. I think the testimony of Dr. McMann really  
10 talks about non-safeguard stuff, and he could be  
11 deposed by telephone, which we've done before with the  
12 state, for example, he may be deposed this Thursday or  
13 Friday. I'm going to be up in New Jersey anyway.  
14 That might be a possibility.

15 ADMIN. JUDGE FARRAR: All right. That  
16 would ordinarily be a good suggestion, Mr. Gaukler,  
17 but I know or I assume the state is traveling. Is  
18 that an option, Ms. Chancellor?

19 MS. CHANCELLOR: Your Honor, I just don't  
20 know if we could squeeze anything in between now and  
21 Sunday. It's sort of crazy around here trying to get  
22 everything to D.C. and get prepared.

23 MR. GAUKLER: But Mr. Soper is not coming  
24 until Sunday I thought I understood.

25 MS. CHANCELLOR: Yes, but we're still all

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1 going to box up our documents and figure out what we  
2 need to get there.

3 I appreciate the offer.

4 ADMIN. JUDGE FARRAR: Ms. Chancellor, why  
5 don't you think about this and add in this suggestion  
6 if it would help. Would this be an instance where you  
7 would like us to make use of that obscure provision in  
8 the regulations where one of your experts is allowed  
9 to conduct the cross examination?

10 I don't know if that would help you and  
11 Mr. Soper.

12 MS. CHANCELLOR: No, I don't think so,  
13 Your Honor. I think it's more of a question of  
14 getting into -- of doing the leg work before a witness  
15 gets on the stand. That's what we haven't had the  
16 chance to do, and I don't think an expert -- where an  
17 expert crossing an expert helps is where it's too  
18 technical for the lawyer, but this is more lack of  
19 knowledge of what the person knows and what his  
20 credentials are, et cetera.

21 MR. TURK: if I can make a suggestion,  
22 Your Honor, this is Sherwin Turk, and I say this  
23 without meaning to prejudice anyone's rights, but we  
24 could do telephone depositions also. There's no  
25 reason for the state to have to interrupt its current

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1 work if we could arrange for a telephone deposition to  
2 be conducted. If the state in Utah did a deposition  
3 by phone, they'll have whatever facts they need before  
4 we enter the hearing room.

5 ADMIN. JUDGE FARRAR: I thought someone  
6 had suggested something that sounded like that, but  
7 the state is concerned that they have too many, you  
8 know, logistical tasks that they're dealing with.

9 MR. GAUKLER: Well, I would say this, Your  
10 Honor. I would think that their expert would do the  
11 leg work in terms of a lot of the stuff, in terms of  
12 to what extent they would need to find technical  
13 information that they may disagree with. That would  
14 be no different than if Dr. Solar had sponsored the  
15 information. They would have to come do the leg work  
16 before the hearing.

17 So I don't think in terms of the leg work  
18 involved the fact that we have a different witness  
19 here makes a difference because if we would have had  
20 the same team of witnesses before as we do now, we  
21 would have responded as such as we did now, and we  
22 would have had to prepare for the hearing in  
23 accordance with the schedule.

24 MS. CHANCELLOR: But, Your Honor, we have  
25 already deposed Dr. Solar, and we know Dr. Solar's

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1 background and the scope of his expertise, et cetera.

2 ADMIN. JUDGE FARRAR: Why don't we do  
3 this, Ms. Chancellor? Why don't you put your experts  
4 to work on the substance of what he says and we'll  
5 give you in some fashion the time later to go after  
6 his background and expertise and qualifications?  
7 Let's have you do your best to challenge the substance  
8 of what he says on the assumption that he's a  
9 legitimate expert and is who he claims to be, and  
10 we'll give you a chance to pursue that further at a  
11 later time either through a phone deposition or  
12 through leg work or so forth, and give you a chance to  
13 come back at the hearing later in some fashion?

14 MS. CHANCELLOR: Okay. That would include  
15 being able to recall him if we had obtained  
16 information that we thought was worthy of further  
17 exploration on the stand?

18 ADMIN. JUDGE ABRAMSON: Yes, I think  
19 that's right. This is Judge Abramson, counselor.

20 If as you allege in your petition that  
21 this testimony addresses, as you put it, the issue  
22 which has continually been the focus of the  
23 proceeding, the material properties and failure rates  
24 of austenitic steel, then your people must have been  
25 focusing on this for quite some time, and the fact

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1 that the applicant has come up with a guy who happens  
2 to be an expert in the microscopic properties of these  
3 two types of steels should be right up the alley of  
4 your own experts at least in terms of addressing what  
5 you're calling the focus of the proceedings.

6 So if we were to tell you to be prepared  
7 to address the approach that this new expert takes,  
8 certainly your experts can do that.

9 ADMIN. JUDGE LAM: Furthermore, this is  
10 Judge Lam. I think the record should reflect that the  
11 State of Utah is more than entitled to depose a new  
12 witness. So we'll make sure that will happen if the  
13 State of Utah wishes to do that.

14 ADMIN. JUDGE FARRAR: Let's give us a  
15 minute here then.

16 MR. GAUKLER: Your Honor.

17 ADMIN. JUDGE FARRAR: Yes.

18 MR. GAUKLER: I don't know if the State of  
19 Utah is entitled to depose a new witness. I would  
20 think we'd be entitled to bring someone on live,  
21 in live rebuttal if the circumstances warranted it.  
22 I certainly don't have any objections to the State of  
23 Utah being allowed and we'll make the witness  
24 available for deposition.

25 I still think that if you're talking about

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1 qualifications a short telephone deposition might be  
2 the best way to do that before they take off from  
3 Utah.

4 ADMIN. JUDGE FARRAR: All right. I think  
5 we have everyone's ideas. We'll go off the record  
6 here for a moment while the Board consults among  
7 itself.

8 (Whereupon, the foregoing matter went off  
9 the record at 4:20 p.m. and went back on  
10 the record at 4:23 p.m.)

11 ADMIN. JUDGE FARRAR: All right. We're  
12 back on the record.

13 Mr. Reporter, are you there?

14 THE REPORTER: Yes, sir.

15 ADMIN. JUDGE FARRAR: All right. We're  
16 going to deny the state's motion to strike the  
17 testimony in question, but we'll allow the state to  
18 depose Dr. McMann either before the hearing if they'd  
19 like. If they choose not to do that, we'll give them  
20 more latitude on cross examination of the substance of  
21 his testimony than we ordinarily would because that,  
22 in effect, would take the place of a deposition, and  
23 if at that time the state is unprepared to question on  
24 his background, we would allow time later for them to  
25 do a phone deposition or whatever checking they want,

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1 and the hearing would be then subject to be reopened  
2 just on the matter of his qualifications.

3 And if the state needs another witness to  
4 counter him, they should let us know about that at the  
5 beginning of the hearing.

6 Is that clear to everybody?

7 MS. CHANCELLOR: Yes, Your Honor, and  
8 we'll work with Mr. Gaukler in terms of whether we  
9 want to do the phone deposition in advance.

10 ADMIN. JUDGE FARRAR: All right. If that  
11 works for you, fine. If that's too much pressure  
12 between now and the start of the hearing, in other  
13 words, we will give you whatever options work so that  
14 we get all of the evidence that's relevant and no  
15 party is prejudiced.

16 Mr. Gaukler, is that plan we announced  
17 clear to you and it works for you?

18 MR. GAUKLER: Yes, Your Honor, it's clear,  
19 and it works for us.

20 ADMIN. JUDGE FARRAR: Okay, and Mr. Turk,  
21 I think that's consistent with the suggestions you  
22 made.

23 MR. TURK: Yes, Your Honor.

24 ADMIN. JUDGE FARRAR: All right. Again,  
25 I appreciate you all dealing with this.

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1 Is there anything else we need to take up?

2 MR. GAUKLER: I don't have anything, Your  
3 Honor. Paul Gaukler for the applicant.

4 MS. CHANCELLOR: Nothing from the state,  
5 Your Honor.

6 MR. TURK: We have nothing from the staff,  
7 Your Honor.

8 ADMIN. JUDGE FARRAR: All right. Then we  
9 will await your arrival on Sunday and look forward to  
10 starting the hearing on Monday. Again, I commend you  
11 all on once we got into the hearing schedule how you  
12 managed to adhere to it and present some remarkably  
13 thorough testimony. You have done this in a basically  
14 cooperative spirit.

15 This is very important. This case has  
16 been pending a long time, and we're at the final  
17 issue. So it's an important case for the citizens of  
18 Utah and for the citizens of the United States, and we  
19 pledge to bring as good an effort on behalf of the  
20 Board now that it's our turn that you all have done on  
21 behalf of your clients.

22 So we look forward to a well thought out  
23 hearing, and you have Sharon's and Amy's phone numbers  
24 for Sunday. I will personally do a dry run with the  
25 guards on Friday to make sure everything is in place

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1 and call us on Friday or between now and Friday. Call  
2 us if there are any problems we have to deal with.

3 Anything else anybody has?

4 MR. GAUKLER: Nothing here, Your Honor.  
5 Paul Gaukler for the applicant.

6 MS. CHANCELLOR: Nothing Your Honor.

7 MR. TURK: Nothing for the staff, Your  
8 Honor.

9 ADMIN. JUDGE FARRAR: All right. Then we  
10 will see you at nine o'clock on Monday morning in our  
11 hearing room.

12 Oh, Mr. Gaukler, where is your war room?

13 MR. GAUKLER: It's at the Ramada Inn.

14 ADMIN. JUDGE FARRAR: In Bethesda?

15 MR. GAUKLER: It's Rockville Pike. It's  
16 just across from Double Tree.

17 ADMIN. JUDGE FARRAR: Oh, okay.

18 MR. GAUKLER: On Twinbrook.

19 ADMIN. JUDGE FARRAR: Okay, and Ms.  
20 Chancellor?

21 MS. CHANCELLOR: We're sharing the same  
22 quarters.

23 ADMIN. JUDGE FARRAR: Oh, okay. And will  
24 you be driving down every day?

25 MS. CHANCELLOR: No, no. We'll be taking

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1 public transportation or the shuttle.

2 ADMIN. JUDGE FARRAR: All right.

3 MR. GAUKLER: We will be driving, I  
4 believe, Your Honor. We did that last time.

5 ADMIN. JUDGE FARRAR: All right, and did  
6 Sharon arrange your parking or what do you do? Go to  
7 the Metro lot?

8 MR. GAUKLER: We arranged visitor parking  
9 last time, and also I think the Metro lots changed  
10 where you can kind of bypass the rules and get in  
11 there. Now I think they have got a different system,  
12 but in any event it is just about choreographed.

13 MR. BARNETT: Your Honor, we're  
14 coordinating with Sharon Perini on parking for counsel  
15 and the witnesses.

16 ADMIN. JUDGE FARRAR: All right, fine.  
17 Then call if you need us. Good luck to all of you.  
18 You've worked hard, and we will await your  
19 presentation. At this point we'll end the call.  
20 Thank you very much.

21 MS. CHANCELLOR: Thank you.

22 MR. TURK: Thank you.

23 MR. GAUKLER: Thank you.

24 (Whereupon, at 4:29 p.m., the  
25 teleconference was adjourned.)

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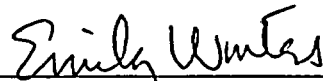
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in the matter of:

Name of Proceeding: Private Fuel Storage, LLC

Docket Number: 72-22-ISFSI

Location: teleconference

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Emily Winters  
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