

June 7, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

PRIVATE FUEL STORAGE, L.L.C.)

(Independent Spent
Fuel Storage Installation))

Docket No. 72-22-ISFSI

NRC STAFF'S RESPONSE TO "STATE OF UTAH'S
MOTION IN LIMINE TO EXCLUDE PART OF THE
TESTIMONY FILED BY JOHN D. PARKYN, CONTENTION E"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730 and the Atomic Safety and Licensing Board's "Memorandum and Order (Granting Joint Motion to Approve Stipulation on Contention Utah S and Outlining Administrative Matters)," dated May 1, 2000, the staff of the Nuclear Regulatory Commission (Staff) hereby responds to the "State of Utah's Motion in Limine to Exclude Part of the Testimony Filed by John D. Parkyn, Contention E" (Motion). For the reasons set forth below, the Staff submits that the State's Motion should be granted in part and denied in part.

BACKGROUND

On May 15, 2000, Private Fuel Storage, L.L.C. (PFS or the Applicant) filed testimony of John Parkyn, Chairman of the Board of Managers of PFS pertaining to construction costs and insurance coverage. See "Testimony of John Parkyn on On-Site Property Insurance for the PFSF Contention Utah E/Confederated Tribes F" ("Insurance Testimony") and "Testimony of John Parkyn on PFSF Construction Costs Contention Utah E/Confederated Tribes F" ("Construction Costs Testimony"). On May 31, 2000, the State filed its Motion, seeking to exclude (a) portions of Mr. Parkyn's testimony regarding certain construction

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cost estimates on the basis that no foundation or basis was provided for Mr. Parkyn's testimony, and (b) seeking to exclude portions of his testimony regarding on-site property insurance on the basis that his testimony consists of legal opinions. See Motion at 1, 3-7.

DISCUSSION

A. Construction Cost Testimony

The rules governing the admissibility of evidence in an NRC adjudicatory proceeding are set forth in 10 C.F.R. § 2.743(c), which specifies that "[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted." The State argues that the Applicant's testimony regarding Mr. Parkyn's testimony concerning cost estimates is not reliable in that "[t]here is no foundation for Mr. Parkyn's testimony." Motion at 4. The State asserts that Mr. Parkyn's testimony goes to "ultimate conclusions" on certain of the construction cost items. In support of its request to exclude Mr. Parkyn's testimony, the State relies on the Appeal Board's decision in *Virginia Elec. and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23 (1979). See Motion at 4-5.

The *North Anna* decision involved the inability of an expert witnesses at the hearing to provide a basis for his conclusion and concerned the weight to be assigned to the testimony. See *North Anna* at 25 (given the Appeal Board's "resultant inability to probe the foundation . . . we entertained considerable doubt that much weight could be attached to that conclusion."). Sufficient information may be made available either in "prepared testimony or on the stand." *Id.* at 25 (emphasis added).

In the Staff's view, the State will have an opportunity to question Mr. Parkyn during cross examination as to any further information that formed the basis for his conclusions. Indeed, the State took Mr. Parkyn's deposition a few weeks before testimony was due to be filed, and it had an opportunity to examine him on the bases for any PFS cost estimates.

Accordingly, the bases for Mr. Parkyn's views should, or could, be known to the State even if not stated expressly in his prefiled testimony. Further, even if PFS is said to have failed to establish a basis for Mr. Parkyn's cost estimates, that would affect the weight to be given to his testimony rather than its admissibility. The State has, therefore, not established that striking Mr. Parkyn's testimony is warranted. Accordingly, the Staff opposes the State's request to strike the specified portion of Mr. Parkyn's construction cost testimony.

B. Insurance Testimony

The State additionally asserts that certain of Mr. Parkyn's testimony regarding insurance availability should be stricken on the basis that it contains impermissible legal arguments or conclusions. Motion at 6. In particular, the State refers to Question 13, which the State asserts "calls for a legal opinion regarding the reasoning behind the NRC's reduction in insurance coverage." *Id.* The Staff agrees that this question involves a request for information in the nature of legal argument, and that it should be stricken. In the event the Applicant seeks to recount the regulatory history for these matters, it may do so in its proposed conclusions of law following the hearing.

The State also seeks to have stricken Question 8, which asks, "For what kinds of facilities does the NRC currently require nuclear property insurance?" See Parkyn (Insurance) at 3. None of the cases cited by the State address the type of testimony that would be elucidated by Question 8. The *Georgia Power* case involved large portions of testimony that were in the nature of "prefiled findings of fact and conclusions of law." See *Georgia Power Co.*, (Vogtle Elec. Generating Plant, Units 1 and 2), 1995 WL 315478, *4 (1995). In contrast, Question 8 calls for limited background information regarding the Commission's requirements.

The Staff notes that the State's citation to *United States v. Lueben* is inapposite, in that *Lueben* concerned an expert's testimony on an "ultimate issue." See *United States v. Lueben*, 812 F. 2d 179, 184 (5th Cir. 1987). Mr. Parkyn's answer to Question 8, in contrast, merely provides background information. Moreover, Mr. Parkyn's answer regarding the Commission's regulations does not concern the admission of opinions which would "tell the jury what result to reach," which was the harm that the Advisory Committee on the Federal Rules sought to address. See *United States v. Lueben*, 812 F. 2d 179, 183-84 (5th Cir. 1987).

The Staff submits that information establishing the framework for the Commission's regulatory requirements is acceptable in testimony where, as here, the information merely provides a background or framework for the testimony which follows, thus making the relevance of the rest of the testimony more apparent. Indeed, the State, in its testimony on Contention Utah E, has similarly discussed the Commission's regulations.¹ Similarly, the State has included regulatory background testimony of this nature in its prefiled testimony on Contention Utah H.²

¹ See, e.g., "Prefiled Testimony of Michael F. Sheehan, Ph.D. on Behalf of the State of Utah Regarding Contention E," May 15, 2000 at Question 13 ("Are you familiar with NRC regulations relating to financial assurance, and if so, what do they require?"), and Question 85 ("Does the Price Anderson Act relate to onsite property insurance coverage at the PFS facility, and if so, how?").

² See, e.g., "Prefiled Testimony of Dr. Marvin Resnikoff and Matthew R. Lamb on Behalf of the State of Utah Regarding Utah Contention H," May 15, 2000 at Question 6 ("Against what standards did you evaluate the thermal analysis for the PFS facility?").

CONCLUSION

For the reasons set forth above, the Staff submits that the State's Motion should be granted in part and denied in part as specified above.

Respectfully submitted,

A handwritten signature in cursive script that reads "Catherine L. Marco".

Catherine L. Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 7th day of June 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of (1) "NRC STAFF'S RESPONSE TO 'APPLICANT'S BRIEF ON THE SCOPE OF UTAH CONTENTION S, BASIS ONE,'" (2) "NRC STAFF'S RESPONSE TO 'APPLICANT'S MOTION TO STRIKE PORTIONS OF TESTIMONY OF MICHAEL SHEEHAN REGARDING UTAH CONTENTION S,'" and (3) "NRC STAFF'S RESPONSE TO 'STATE OF UTAH'S MOTION IN LIMINE TO EXCLUDE PART OF THE TESTIMONY FILED BY JOHN D. PARKYN, CONTENTION E'" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 7th day of June, 2000:

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