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June 7, 2000  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

OFFICE OF SPECIAL  
ATTORNEY  
JUDICIAL STAFF

In the Matter of )

PRIVATE FUEL STORAGE L.L.C. )

(Private Fuel Storage Facility) )

Docket No. 72-22-ISFSI

**APPLICANT'S RESPONSE TO STATE MOTION TO EXCLUDE  
TESTIMONY OF JOHN D. PARKYN ON UTAH CONTENTION E**

Pursuant to the Memorandum and Order of the Atomic Safety and Licensing Board ("Board") of May 1, 2000,<sup>1</sup> Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") files this response opposing the State of Utah's Motion in Limine to Exclude Part of the Testimony Filed by John D. Parkyn, Contention E (May 31, 2000) [hereinafter "State Mot."]. Contrary to the State's claims, Mr. Parkyn's testimony regarding PFS's construction cost estimates is admissible, in that Mr. Parkyn is a subject matter expert. Also contrary to the State's claims, Mr. Parkyn's testimony regarding on-site property insurance for the Private Fuel Storage Facility ("PFSF") is admissible, in that it sets forth a factual explanation of NRC policy, not a legal conclusion.

**I. BACKGROUND**

On May 15, 2000, PFS filed testimony regarding Utah Contention E ("Utah E"). The testimony of John Parkyn, Chairman of the PFS Board of Directors, concerns PFSF construction costs,<sup>2</sup> on-site property insurance for the PFSF,<sup>3</sup> and (with Jon Kapitz) PFSF

<sup>1</sup> Memorandum and Order (Granting Joint Motion to Approve Stipulation on Contention Utah S and Outlining Administrative Matters) (May 1, 2000).

<sup>2</sup> Testimony of John Parkyn on PFSF Construction Costs Contention Utah E/Confederated Tribes F (May 15, 2000) [hereinafter "Parkyn Const."].

<sup>3</sup> Testimony of John Parkyn on On-Site Property Insurance for the PFSF Contention Utah E/Confederated Tribes F (May 15, 2000) [hereinafter "Parkyn Ins."]. PFS also filed the Testimony of Hanson D. Picklerl on

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operation and maintenance costs.<sup>4</sup> Mr. Parkyn's testimony on construction costs concerns the total construction cost estimate for the PFSF, which consists of estimates developed by Stone & Webster Engineering Corp. (discussed in detail in separate testimony<sup>5</sup>) and individual estimates developed by Mr. Parkyn. Parkyn Const. at 5. For each construction cost estimate for which Mr. Parkyn was responsible (primarily rail equipment and other related transportation equipment), Mr. Parkyn's testimony consists of the estimated cost and the basis for the estimate. Id. at 7-12. Mr. Parkyn's testimony regarding on-site property insurance includes a statement of how much on-site property insurance PFS will maintain for the PFSF, a factual explanation of the basis for the NRC's policy concerning on-site property insurance requirements for reactors undergoing decommissioning with spent fuel on site, and Mr. Parkyn's opinion as to why, given NRC policy, the amount of on-site property coverage planned for the PFSF is sufficient. Parkyn Ins. at 3-8.

The State of Utah requests that the Board exclude Mr. Parkyn's answers to questions 19, 20, 22-26, 29, 31, 34-35, 37-38, and 40-41 in his testimony on construction costs on the grounds that they are "unsupported and unreliable." State Mot. at 8. It requests that the Board exclude Mr. Parkyn's answer to question 13 in his testimony on insurance on the grounds that it "sets forth legal conclusions and arguments in the nature of a brief rather than testimony." Id. The State's claims are meritless and its requests should be denied. Mr. Parkyn is a subject matter expert regarding the construction costs

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Nuclear Property Insurance for the PFSF Contention Utah E/Confederated Tribes F (May 15, 2000).

<sup>4</sup> Testimony of John Parkyn and Jon Kapitz on the Operation and Maintenance Costs of the PFSF Contention Utah E/Confederated Tribes F (May 15, 2000) .

<sup>5</sup> See Testimony of Joseph F. Gase and George L. Takacs IV on PFSF Construction Costs Contention Utah E/Confederated Tribes F (May 15, 2000).

for the PFSF to which he testifies and thus he may render opinions on the basis of his experience. Mr. Parkyn's testimony on property insurance does not constitute a legal argument or legal conclusion but rather is a factual explanation of the basis for NRC policy on property insurance for reactors undergoing decommissioning with spent fuel on site and how that policy should apply to the PFSF.

## II. DISCUSSION

The portions of Mr. Parkyn's testimony challenged by the State are admissible under NRC rules of evidence, and therefore the State's motion to strike should be denied.

### A. Mr. Parkyn's Testimony on Construction Costs Is Admissible

Mr. Parkyn's testimony on PFSF construction costs is admissible expert testimony. Under NRC regulations governing testimony at hearings, relevant, material, and reliable evidence is admissible. 10 C.F.R. § 2.743(c). The NRC generally follows the Federal Rules of Evidence in admitting expert testimony. See Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 720 n.52 (1985). A witness may qualify as an expert on the basis of "knowledge, skill, experience, training, or education." FRE 702. Expert testimony may be a product of the independent judgment of the expert, based on his education, experience and observations. Limerick, ALAB-819, 22 NRC at 720 ("Expert testimony . . . is typically a mixture of scientific principles (known to the expert through his or her training and experience), data derived from analyses or by perception, *and* the expert's *opinions* based on these principles and data.") (emphasis in original); Smith v. Ford Motor Co., 2000 U.S. App. LEXIS 12095 at \*8 (7<sup>th</sup> Cir. June 2, 2000). In addition, expert testimony may rely on information obtained from or analyses performed by individuals other than the expert. Limerick, ALAB-819, 22 NRC at 718; see FRE 703.

On the basis of his experience and education, Mr. Parkyn is qualified as an expert to testify to the construction and rail equipment cost estimates for the PFSF for which he was responsible. He is a nuclear engineer and utility executive with 30 years of experience in the nuclear industry. Parkyn Const. at 2. He has served in a wide range of positions with nuclear utilities where his responsibilities included budgeting and cost estimating. Id. He served as Plant Manager and Acting Chief Executive Officer for Nuclear Power at Dairyland Power's LaCrosse Boiling Water Reactor, where he was responsible for the oversight of plant operations and all of the budgeting for the site. Id. Concerning the specific area of rail equipment costs, Mr. Parkyn is now serving on the Governor's Commission on Passenger Rail in Wisconsin. Id. He had served as a member of the Wisconsin Legislative Study Committee on Railroads and as a fuel shipping supervisor both with Dairyland Power and Wisconsin Electric Power. Id. Therefore, on the basis of his experience Mr. Parkyn is qualified to render an opinion regarding construction costs and rail equipment costs for the PFSF. Furthermore, as shown below in response to the State's individual claims, Mr. Parkyn's testimony is permissibly based on his education, experience, and observations and thus it is admissible.

The State argues – erroneously – that Mr. Parkyn's testimony must be excluded because “there is no foundation” for the individual cost estimates set forth therein. State Mot. at 5. At the outset, the sole legal precedent cited by the State, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23 (1979), provides no support for its claim. As set forth by the Appeal Board in that case:

[W]e do not suggest that a witness testifying to the results of an analysis must have at hand every piece of datum which was utilized in performing that analysis. Obviously, any such requirement would impose an insuperable – and unnecessary – burden. In this area, as in others, a rule of reason must be applied. It is not unreasonable, however, to insist that where, as

here, the outcome on a clearly defined and substantial safety or environmental issue may hinge upon the acceptance or rejection of an expert conclusion resting in turn upon a performed analysis, the witness must make available (either in his prepared testimony or on the stand) sufficient information pertaining to the details of the analysis to permit the correctness of the conclusion to be evaluated.

Id. at 27 (emphasis added). First, the circumstances are different here than in North Anna. There, an expert on the stand at the hearing had not included certain factual bases for a safety analysis in his testimony and when asked for the bases on the stand by the Appeal Board he produced a report that still did not contain the requested information; further Appeal Board inquiry was met with an initial response that the information was proprietary to the expert's employer and could not be disclosed. Id. at 26. By contrast here, the Applicant is in no way attempting to stonewall the Board or the other parties regarding the bases for an ultimate conclusion on a substantial issue. The State is merely complaining, before the hearing (and without basis, as shown below), that some of the individual details of Mr. Parkyn's assessment of PFS's construction costs are not supported to the State's satisfaction. Although making this complaint, the State in the testimony of its own expert has supplied no contrary cost estimates or factual evidence to show that Mr. Parkyn's cost estimates are wrong.<sup>6</sup>

Second, Mr. Parkyn has not yet taken the stand; the State will at that time have the opportunity to cross-examine him at the hearing on the foundation and bases for his cost estimates. Moreover, in this regard, the State already has had a complete and unfettered

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<sup>6</sup> The testimony of the State's expert, Dr. Michael Sheehan, simply makes generalized arguments regarding what he claims are alleged uncertainties in the PFS cost estimates. Prefiled Testimony of Michael F. Sheehan, Ph.D, on Behalf of the State of Utah Regarding Contention Utah E, Questions 26-27 at pp.16-18 (May 15, 2000). Dr. Sheehan provides no contrary cost estimates on the items in question, or hard facts or evidence to show that the PFS cost estimates in Mr. Parkyn's testimony are erroneous. Id.

opportunity to ask Mr. Parkyn about the basis for his cost estimates at his deposition.<sup>7</sup>

Thus, it should not now be heard to complain about his testimony on that subject.

Moreover, federal case law confirms that – contrary to the State’s legal argument – the striking of expert testimony as matter of law is focused on the reliability of an expert’s methodology, and on not the factual foundation (or lack thereof) of the expert’s conclusion; the latter is an issue of fact to be determined after cross examination. As clearly stated in this regard by the Seventh Circuit:

[T]he court’s gatekeeping function [in admitting expert testimony] focuses on an examination of the expert’s methodology. The soundness of the factual underpinnings of the expert’s analysis and the correctness of the expert’s conclusions based on that analysis are factual matters to be determined by the trier of fact.<sup>8</sup>

\* \* \* \* \*

The question of whether [an] expert is credible or whether his or her theories are correct given the circumstances of a particular case is a factual one that is left for the jury to determine after opposing counsel has been provided the opportunity to cross-examine the expert regarding his conclusions and the facts on which they are based.<sup>9</sup>

Here, from a methodological perspective, Mr. Parkyn, as an expert, permissibly relies on his education, experience, and observations in forming the opinions presented in his testimony. Thus, the State’s complaints about the adequacy of the factual underpinnings of his testimony – even if they were correct – are no basis for its exclusion.

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<sup>7</sup> PFS specifically indicated to the other parties that Mr. Parkyn would “testify concerning construction and operational costs, including the cost of rail equipment, associated with the PFS Facility.” Applicant’s Fourth Supplemental Response to State’s First Requests for Discovery (April 18, 2000) at 3. When deposing Mr. Parkyn, the State asked him what were the costs of the transportation cask, the impact limiters the transportation cask railcar (and yoke, or shipping cradle) and the dry transfer system, Deposition of John D. Parkyn, Tr. at 38, 48, 120-121 (May 3, 2000), but the State did not ask him about any other costs and, other than the dry transfer system, did not ask about the basis for any of his estimates.

<sup>8</sup> Smith, 2000 U.S. App. LEXIS 12095 at \*9 (citing Walker v. Soo Line R.R. Co., 208 F.3d 581, 587 (7<sup>th</sup> Cir. 2000)).

<sup>9</sup> Id. at \*10-\*11 (citing Walker, 208 F.3d at 589-90).

Furthermore, the State's arguments that Mr. Parkyn has provided "no reason" for his answers, State Mot. at 3, that Mr. Parkyn's testimony has "no . . . foundation," and that his testimony is "merely a compilation of summary cost estimates" that "does not break down or describe items with specificity," *id.* at 5, are plainly wrong. For example, Mr. Parkyn testifies to the total Phase I project construction costs and the amount of the total for which he was responsible for estimating (approximately one-fourth of the Phase I total). Parkyn Const. at 5 (Answer 11).<sup>10</sup> He then provides specific estimates for the costs of the 14 individual items that comprise the Phase I costs for which he was responsible, specifying the bases for each of the 14 individual estimates. *Id.* at 7-11.

The State's complaints about specific parts of Mr. Parkyn's testimony (Answers 19-20, 22-26, 29, 31, 34-35, 37-38, and 40-41, State Mot. at 8) are also meritless. As discussed above, expert testimony can be based on the judgment of the expert relying on his education, experience and observations. Limerick, ALAB-819, 22 NRC at 720; Smith, 2000 U.S. App. LEXIS 12095 at \*8. Some of Mr. Parkyn's cost estimates to which the State objects are based, entirely or in part, on his judgment, relying on his experience and observations. Parkyn Const. at 7-11 (Answers 20, 23- 26, and 41). As also shown above, expert testimony may be based on information acquired from others. Limerick, ALAB-819, 22 NRC at 718; see FRE 703. A number of the bases for Mr. Parkyn's estimates to which the State objects are drawn, entirely or in part, from discussions he has had with knowledgeable people. Parkyn Const. at 7-10 (Answers 20, 23-26, 35, and 38). In the same vein, the basis for Mr. Parkyn's estimate for the spent fuel cask railcars are bids received from vendors. Parkyn Const. at 7-10 (Answer 22).<sup>11</sup>

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<sup>10</sup> Those estimates set forth in Answer 11 do not include estimates for associated administrative and operational costs for which Mr. Parkyn also provides specific estimates for individual items. See id. at 13-15

<sup>11</sup> PFS has provided the State with copies of these bids as well as a related Stone & Webster cost estimate.

Finally, some of the estimates to which the State objects as unsupported are supported by Mr. Parkyn's testimony itself. Indeed, Answer 19 is the sum of the rail transportation equipment costs listed in PFS Exhibit C. Parkyn Const. at 7, Exhibit C at 1. Answer 29 is the sum of the costs of the other loading system equipment listed in Exhibit C. Parkyn Const. at 9; Exhibit C at 1. The basis for Answer 31 (spent fuel transfer cask cost) is Answer 32, which the State does not challenge. Parkyn Const. at 9. The basis for Answer 34 (miscellaneous site canister transfer equipment cost) is Answer 35, which is drawn from discussions Mr. Parkyn has had with individuals at Southern Nuclear. *Id.* at 9-10. The basis for answer 37 (spent fuel cask hauler cost) is Answer 38, which is also drawn from discussions Mr. Parkyn has had with individuals at Southern Nuclear. *Id.* at 10. The basis for Answer 40 (dry transfer system cost) is Answer 41, which is based on Mr. Parkyn's expert judgment and the cost of a transportation cask. *Id.* at 11.

In sum, Mr. Parkyn permissibly relies on his education, experience, and observations in forming the opinions presented in his testimony. Thus, the State's complaints that Mr. Parkyn's testimony should be excluded for lack of foundation are groundless.

**B. Mr. Parkyn's Testimony on On-Site Insurance Is Admissible**

Mr. Parkyn's testimony regarding how much on-site property insurance PFS must have for the PFSF is also admissible. Contrary to the State's claim, State Mot. at 9, Mr. Parkyn's answer to question 13 does not impermissibly "set[] forth legal conclusions and arguments in the nature of a brief rather than testimony."

In Mr. Parkyn's testimony on on-site property insurance, Question 13 asks:

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See Letters from Jay Silberg to Denise Chancellor of June 1, 2000 and June 2, 2000, and Letter from Paul Gaukler to Denise Chancellor of June 6, 2000. PFS had also previously provided the State during discovery with copies of documents generally concerning the cost of rail equipment. See PFS Bates Nos. 00008-00012.



Q13. What was the basis for the reduced coverage allowed by the NRC for those reactors [undergoing decommissioning] and would that basis apply to an ISFSI like the PFSF?

Parkyn Ins. at 6. Mr. Parkyn replies by describing the technical reasoning the NRC applied in granting partial exemptions to its on-site property insurance requirements to reactors undergoing decommissioning with spent fuel on site. Id. at 6-8. He compares the conditions that will be present at the PFSF to those that are present at reactors undergoing decommissioning and concludes that the risk of a release of radioactive material from the PFSF is lower than the risk of a release from a reactor spent fuel pool. Id. Thus, Mr. Parkyn's answer to Question 13 is simply not a legal opinion or conclusion.

The cases cited by the State do not support its position. In United States v. Lueben, 812 F.2d 179, 183-84, vacated in part on other grounds, 816 F.2d 1032 (5<sup>th</sup> Cir. 1987), the court explains that while under FRE 704 an expert cannot "simply tell the jury what result to reach," he or she can answer "fact-oriented question[s]" that go to the ultimate issue to be decided. See FRE 704 ("testimony in the form of an opinion . . . is not objectionable because it embraces an ultimate issue to be decided. . .") (emphasis added).

Thus, Lueben supports PFS's position, not the State's.<sup>12</sup> As Lueben indicates, under FRE 704, expert testimony on the ultimate issue is admissible so long as it is not "phrased in terms of inadequately explored legal criteria." Lueben, 812 F.2d at 183-84. Thus, as set forth in the Advisory Committee's Note to FRE 704, "the question, 'Did T have capacity to make a will?' would be excluded, while the question, 'Did T have suffi-

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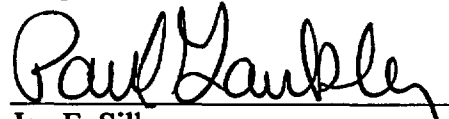
<sup>12</sup> Illinois Power Company (Clinton Power Station, Units 1 and 2), LBP-75-59, 2 NRC 579, 586 (1975) provides no support for the State, in that the licensing board there struck the testimony of the expert without describing it in any way or explaining why it was doing so. Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), 1995 WL 315478 (N.R.C.), as an unpublished licensing board memorandum and order, is entitled to no weight in the first place. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant Units 1 and 2), ALAB-592, 11 NRC 744, 745 (1980). Secondly, it provides no support for the State because it does not describe the stricken testimony sufficiently to allow anyone to conclude that it is comparable to Mr. Parkyn's.

cient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed." Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 285 (1973).<sup>13</sup> Mr. Parkyn's testimony consists of fact-oriented answers to questions that show on technical, policy grounds that the on-site property insurance requirements for the PFSF ought to be no more than those the NRC imposes on reactors undergoing decommissioning with spent fuel on site. Therefore, under FRE 704, his testimony is admissible and should not be excluded.<sup>14</sup>

### III. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Board deny the State's motion to exclude the testimony of John Parkyn concerning PFSF construction costs and on-site property insurance for the PFSF.

Respectfully submitted,



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June 7, 2000

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<sup>13</sup> See also, e.g., *United States v. Buchanan*, 787 F.2d 477, 483-84 (10<sup>th</sup> Cir.), cert. denied, 494 U.S. 1088 (1986) (approving testimony of BATF officer that particular type of device would have to be registered with Treasury as not improper legal conclusion but opinion relating to ultimate fact); *United States v. Gold*, 743 F.2d 800, 817 (11<sup>th</sup> Cir.), cert. denied, 469 U.S. 1217 (1984) (in trial for Medicare fraud, court properly let expert say whether particular claims were eligible for reimbursement).

<sup>14</sup> The State also asserts that Answer 8, that the NRC currently requires on-site property insurance only for reactors, is an impermissible legal conclusion (albeit it does not ask to strike Answer 8 in the relief requested). State Mot. at 7-8. The State is wrong, in that Answer 8 is only part of, and background to, Mr. Parkyn's discussion of NRC policy on on-site insurance and his assessment of how much insurance would be needed to cover the potential costs of accident recovery for the PFSF.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22
	)	
(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Response to State Motion to Exclude Testimony of John D. Parkyn on Utah Contention E" was served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 7<sup>th</sup> day of June 2000.

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