

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO MOTIONS IN LIMINE
FILED BY THE APPLICANT AND STATE CONCERNING
CONTENTION UTAH K/ CONFEDERATED TRIBES B

Pursuant to 10 C.F.R. §§ 2.730 and 2.743(c), and the Atomic Safety and Licensing Board's "Prehearing Memorandum: Summary and Order," dated March 22, 2002, the staff of the Nuclear Regulatory Commission (Staff) hereby responds to the March 25, 2002, motions *in limine* filed by the State and Private Fuel Storage, L.L.C. (PFS or the Applicant) regarding Contention Utah K/Confederated Tribes B.¹ The Staff generally supports the Applicant's motion and disagrees with the State's Motion.

DISCUSSIONA. The Applicant's Motion in Limine

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 Applicant moved to strike those portions of Dr. Resnikoff's testimony and related exhibits that address the potential dose

¹ See "Applicant's Motion to Strike Portions of State of Utah's Prefiled Testimony of Dr. Marvin Resnikoff Regarding Utah Contention K/ Confederated Tribes Contention B," dated March 25, 2002. See "State of Utah's Motion in Limine to Exclude Applicant's Prefiled Direct Testimony of James L. Cole, Jr., Wayne O. Jefferson, Jr., and Ronald E. Fly," dated March 25, 2002.

consequences of aircraft crashes. The Applicant claimed, among other things, that this aspect of Dr. Resnikoff's testimony is not relevant to determining the probability of a crash occurring. See Applicant's Motion at 2 and 5-6. The Staff agrees with the Applicant that this testimony is irrelevant and should be stricken.²

The Applicant also moved to strike those portions of Dr. Resnikoff's testimony and related exhibits that pertain to the probability of general aviation crash hazards. The Applicant argued that this matter has been excluded from further litigation as a result of a Licensing Board summary disposition ruling. See Applicant's Motion at 6-7; see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-19, 53 NRC 416, 452 (2001). The Staff notes that the incorrect figure appears to be an oversight. See Resnikoff Testimony at A39 ("Values for . . . general aviation aircraft have been determined by previous order"). Nevertheless, the Applicant is correct that the incorrect figure should be excluded from testimony.

C. The State's Motion

State moved to strike all of the Applicant's panel's testimony on the basis that it is improperly presented in panel form, each witness is not qualified as an expert for every question, the testimony contains expert opinions of unidentified persons, and the testimony is based on unreliable methodology. State Motion at 1. The Staff disagrees with the State that the Applicant's testimony should be stricken and offers the following discussion regarding the use of witness panels and the Applicant's alteration of the NUREG-0800 methodology.

The State argues that the Applicant's panel testimony is improper in that "this Licensing Board" has stated that a panel format is not acceptable "absent clear and compelling reasons" and that the testimony did not identify the witness responding to each question. State Motion at 3. The

² See "NRC Staff's Motion in Limine to Exclude Portions of the State of Utah's Prefiled Testimony and Exhibits Concerning Contention Utah K/Confederated Tribes B," dated March 25, 2002, at 5.

Staff disagrees with the State that “this Licensing Board” has discouraged the use of panel testimony.³ Rather, witness panel testimony has been approved for use in this proceeding, and, in fact, was used during the June 2000 hearing. See Tr. 1200 (Ms. Chancellor asked, “Is it possible to have a panel of witnesses?”. Judge Bollwerk answered, “Yes, and in fact that is often done.”). Further, the use of witness panel testimony is considered an acceptable and commonplace practice in NRC adjudicatory proceedings. See *Consumers Power Co. (Midland Plant, Units 1 & 2)*, ALAB-379, 5 NRC 565, 569 (1977) (in many cases the direct testimony is presented by a panel of witnesses -- and no one witness may be able to endorse or explain the entire testimony). Regarding the State’s other specific concerns regarding the witness responses to individual questions, the State has the ability to elicit the information it seeks in cross-examination. Therefore, this testimony should not be stricken.

The State argues that the Applicant’s alteration of the NUREG-0800 methodology to consider a pilot’s ability to avoid the facility is a rejection of that methodology and, in fact, constitutes a new methodology. State Motion at 8-12. The State claims the “new methodology” is unreliable and should be excluded from consideration. *Id.* at 9, *citing Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Staff submits that the Applicant’s alteration of the NUREG-0800 methodology did not render it a new methodology in that the base calculation as set forth in NUREG-0800 remains the same. The Applicant refined the methodology to reflect pilot avoidance as a subgroup of all forms of accidents - - yet, the overall calculation remained the same. Therefore, the methodology is not new.

³ The State cites to an old enforcement proceeding for the proposition that witnesses should testify individually. See State Motion at 3, *citing Safety Light Corp.*, “Memorandum and Order (Ruling on Pending Motions. . .),” dated September 10, 1991. That licensing board directed that questions and answers be read out loud at the hearing to enable it to assess the credibility of witnesses through their demeanor and appearance. This enforcement case is inapposite to this licensing action where witness credibility is not directly in issue.

The Staff further submits that the Applicant's testimony regarding its alteration of NUREG-0800 does not constitute unreliable evidence.⁴ The Applicant's modification of established NUREG-0800 methodology has been subjected to independent review. In this regard, the Staff has submitted prefiled testimony that states that the Applicant followed the NUREG-0800 formula. See Staff Testimony at A13. The Staff considered the Applicant's alteration of that formula to be a modification to reflect the potential for a pilot to direct the aircraft away from a fixed ground site. This testimony was endorsed by two expert witnesses: Amitava Ghosh and Kazimieras Campe.⁵ The Staff reviewed the Applicant's evaluation of external events, and, in particular, the Applicant's modification of the calculation based on pilot avoidance and found it to be acceptable. Staff Testimony at A3 and A103.⁶

Thus, the Applicant's alteration of NUREG-0800 methodology does not constitute new methodology and has been subjected to independent professional analysis by the NRC staff. Therefore, the Applicant's testimony is sufficiently reliable to be admitted into evidence, and the State's Motion with respect to this testimony should be denied.

⁴ The Staff notes that although the licensing boards are not required to adhere to the Federal Rules of Evidence, which are more stringent than NRC's rule when considering the admission of technical evidence, licensing boards may refer to them for guidance. See *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 365 n.32 (1983) (Federal Rules of Evidence are used for guidance in administrative proceedings). Licensing boards are, therefore, not required to adhere to the *Daubert* criteria in evaluating scientific evidence. The Staff nonetheless submits that the introduction of the Applicant's testimony is sufficiently reliable to be admissible in evidence under both *Daubert* and the Commission's regulations.

⁵ Dr. Kazimieras Campe, was the principal contributor regarding that portion of NUREG-0800 pertaining to the methodology that the State asserts has been rejected. See Kazimieras M. Campe, Statement of Professional Qualifications at 2.

⁶ The Staff's evaluation was published in "Safety Evaluation Report Concerning the PFS Facility," Supp. No.1, dated November 13, 2001.

CONCLUSION

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

Respectfully submitted,

/RA/

Catherine L. Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 29th day of March, 2002

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO MOTIONS IN LIMINE FILED BY THE APPLICANT AND STATE CONCERNING CONTENTION UTAH K/ CONFEDERATED TRIBES B," 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 29th day of March, 2002:

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